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N. 2885

No. 14197

United States
Court of Appeals
for the Ninth Circuit

W. O. BEDAL,

Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Appellee;

and

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Transcript of Record

Appeals from the United States District Court for the District of Idaho

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-5-54

No. 14197

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W. O. BEDAL,

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NAMES AND ADDRESSES OF ATTORNEYS

LAUREL E. ELAM,
CARL A. BURKE,
CARL P. BURKE,
FRED M. TAYLOR,
Boise, Idaho,

Attorneys for Appellant.

BRYAN P. LEVERICH,
10 South Main Street,
Salt Lake City, Utah;

L. H. ANDERSON,
E. H. CASTERLIN,
E. C. PHOENIX,
P.O. Box 530,
Pocatello, Idaho;

OSCAR W. WORTHWINE,
P.O. Box 737,
Boise, Idaho;

J. L. EBERLE,
Idaho Building,
Boise, Idaho,

Attorneys for Appellees.

In the United States District Court, for the District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant.

COMPLAINT

The plaintiffs complain of the defendant and allege as follows:

I.

That the plaintiffs, and each of them, are corporations organized and existing under the laws of the State of Utah; the defendant, The Hallack and Howard Lumber Company, is a corporation organized and existing under the laws of the State of Colorado. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That on the 3rd day of March, 1944, the plaintiffs herein, as lessor, entered into a lease agreement with the defendant, The Hallack and Howard Lumber Company, as lessee, whereby a portion of the lessor's premises at Banks, Boise County, Idaho,

was leased to the said Lumber Company for a log loading site, a true copy of which lease is hereto attached marked Exhibit "A" and made a part hereof. That said lease, among other things, provides that the lessee, The Hallack and Howard Lumber Company, agrees to hold harmless the lessors, plaintiffs herein, and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing "by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

III.

That on or about the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect and that at said time and place, while the defendant, its agents, servants, or employees, were unloading logs onto said leased premises and using and occupying said premises in accordance with the terms and conditions of said lease, a piece of timber broke off one of the logs being unloaded and struck one A. M. Powell, a car inspector employed by the Union Pacific Railroad Company at Banks, Boise County, Idaho, seriously injuring the said Powell.

IV.

That as a result of said accident and injuries sustained, A. M. Powell, on the 3rd day of October,

1950, filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained, demanding judgment in the sum of $45,000.00

V.

That thereupon the plaintiff, Union Pacific Railroad Company, gave notice to the defendant herein of the pendency and nature of said action, calling its attention to the lease and its provisions hereinbefore referred to, and tendered to said defendant the defense of said action, requesting that said defense be undertaken by it, with notice that the plaintiff Union Pacific Railroad Company expected to be fully reimbursed for any judgment that might be recovered against it by the said Powell, together with all expenses incurred in the event said defendant did not take over said defense and assume all liability, but that said defendant refused and neglected to do so.

VI.

That the Plaintiff, Union Pacific Railroad Company, conducted said defense in said action in good faith and with due diligence before the court and jury, commencing the 26th day of February, 1951, and on the 2nd day of March, 1951, the jury returned a verdict in favor of said plaintiff, A. M. Powell, and against the said Union Pacific Railroad Company in the sum of $15,000.00. Judgment on the verdict, including costs in the amount of $92.26,

with interest at 6% per annum, was entered, and on September 18, 1951, Motion for Judgment Notwithstanding the Verdict was by the court denied, and which judgment the defendant herein had notice but it failed, refused and neglected to take any part in any or all of the further proceedings had in connection with said action.

VII.

That thereafter, to wit, on the 15th day of December, 1951, the said Union Pacific Railroad Company compromised said judgment by paying to the plaintiff the total sum of $14,500.00 and said judgment was fully satisfied.

VIII.

That the defendant, although requested to do so, has failed and neglected to play the plaintiffs, or either of them, all or any part of the damages and expenses incurred arising out of the action of A. M. Powell vs. Union Pacific Railroad Company, and the plaintiff, Union Pacific Railroad Company, has been damaged thereby for settlement in satisfaction of the judgment in said case in the amount of $14,-500.00; costs and expenses of the litigation $1,076.98, together with reasonable attorneys fees in the amount of $1,425.00.

IX.

That the accident and resulting injuries to the said Powell were wholly caused by the use and occupation of said leased premises and the unloading of logs thereon by The Hallack and Howard Lumber Company, its agents, servants or employees, who

had the sole and exclusive jurisdiction over said premises and the unloading of said logs thereon, and that accordingly, under the provisions of said lease agreement, or independent of said lease, it became and was the duty of the defendant to assume and pay for all injuries and damages sustained by the said A. M. Powell, and to indemnify the plaintiffs, particularly the Union Pacific Railroad Company, against, and save them harmless from, all liability from such injuries, damages or loss.

Wherefore, plaintiff, Union Pacific Railroad Company, prays judgment against the defendant, The Hallack and Howard Lumber Company, in the sum of $17,001.98, with interest thereon at the rate of 6% per annum from the 15th day of December, 1951, and for such other relief as may be deemed proper in the premises.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

EXTENSION RIDER Exhibit "A"

To be attached to agreement Audit No. A-57428 Lease L&T No. 13079

No. No.

Between OREGON SHORT LINE RAILROAD COMPANY
UNION PACIFIC RAILROAD COMPANY (Lessor)

and THE HALLACK & HOWARD LUMBER CO. (Lessee)

Assignments—Date - - - Name of assignee

Date Name of assignee

Covering Log Loading Site

Audit A-57428-1

Location Banks, Idaho

Dated Mar. 3, 1941 Effective Date Mar. 1, 1944 Expiration (Original) Feb. 28, 1949

Expiration (by latest extension) - - -

Supplements, including extension riders Dates - - -

IT IS HEREBY MUTUALLY AGREED by and between the present parties to the above named agreement that the term thereof shall be and is hereby extended to and including February 28, 1954, and that all the terms and conditions thereof, as heretofore (if supplements to the original agreement are indicated above) or herein (if any special provisions are written below) amended, shall remain in full force and effect during the extended term, said agreement with the amendments and supplements (if any) to be subject to termination prior to the expiration of the extended term in the same manner as is provided therein for termination prior to the expiration of the term hereby extended

Special Provisions

Effective with the beginning of the extension of the term hereby created, the original agreement, as amended or extended shall be and is hereby amended as set out on the reverse side hereof.

Dated November 15, 1948 Made in duplicate

OREGON SHORT LINE RAILROAD COMPANY
UNION PACIFIC RAILROAD COMPANY

Witness

By
General Manager

Witness:

THE HALLACK & HOWARD LUMBER CO.

By

Attest:

Its President

Secretary

DUPLICATE ORIGINAL - RAILROAD CO'S COPY

APPROVED: APPROVED AS TO: FORM
Burt Faulson
ACTING MGR.
GENERAL LAND & TAX AGENT
GENL. SOLICITOR C.
EXECUTION
GENL. SOLICITOR C.

APPROVED
SUPERINTENDENT

Section 6 shall be amended by the addition thereto of the following sentence:

In the event any building or other improvement not belonging to the Lessor on the leased premises is damaged or destroyed by fire, storm or other casualty the Lessee shall, within thirty days after such happening, remove all debris and rubbish resulting therefrom; and if Lessee fails so to do Lessor may enter the leased premises and remove such debris and rubbish, and the Lessee agrees to reimburse the Lessor, within thirty days after bill rendered, for the expense so incurred.

Sections 16 and 17 shall be amended to read as follows:

J. B. M.

Section 16. This lease may be terminated by written notice given by either the Lessor or the Lessee to the other party on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given. Said notice may be given to the Lessee by serving the Lessee personally or by posting a copy thereof on the outside of any door in any building upon the leased premises or by mailing said notice, postage prepaid, to the Lessee at the last address known to the Lessor. Said notice may be given to the Lessor by mailing the same, postage prepaid, to the office of the General Manager of the District of the Lessor in which the leased premises are located. Upon such termination and vacation of the premises by the Lessee, the Lessor shall refund to the Lessee on a prorata basis, any unearned rental paid in advance.

Section 17. The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises upon the termination of the lease howsoever. Within thirty days after such termination the Lessee shall (a) remove from the premises, at the expense of the Lessee, all structures and other property not belonging to the Lessor; and (b) restore the surface of the ground to as good condition as the same was in before such structures were erected, including among other things, the removal of foundations of such structures, the filling in of all excavations and pits and the removal of all debris and rubbish, all at the Lessee's expense, failing in which the Lessor may perform the work and the Lessee shall reimburse the Lessor for the cost thereof within thirty days after bill rendered.

In the case of the Lessee's failure to remove said structures and other property, the same shall, upon the expiration of said thirty days after the termination of this lease, become and thereafter remain the property of the Lessor; and if within ninety days after the expiration of such thirty-day period the Lessor elects to and does remove, or cause to be removed, said structures and other property from the leased premises and the market value thereof or salvage or of the material therefrom does not equal the cost of such removal plus cost of restoring the surface of the ground as aforesaid, then the Lessee reimburse the Lessor for the deficit within thirty days after bill rendered.

...d ...ginal or ... cost of re... ...imburse the ...

FORM 2808-A

...Lease C. S. 11-22-1926

...A 57428

No. _____ Audit No. _____ L&T No. 13079

LEASE

Date. THIS AGREEMENT, made and entered into this 3rd day of March 1944,

Parties. by and between OREGON SHORT LINE RAILROAD COMPANY a corporation of the State of Utah and its Lessee, UNION PACIFIC RAILROAD COMPANY, a corporation of the State of Utah (hereinafter collectively called "Lessor"), parties of the first part, and THE HALLACK & HOWARD LUMBER CO., a corporation of the State of Colorado,

(hereinafter called "Lessee"), party of the second part, WITNESSETH:

Section 1. The Lessor, for and in consideration of the covenants and payments hereinafter mentioned, to be performed and made by the Lessee, hereby agrees to lease and let and does hereby lease and let unto the Lessee

Term. for a term beginning on the 1st day of March 1944, and exteading to the 28th day of February 1949, unless sooner terminated as herein provided,

Location. the portion of the premises of the Lessor ... at Banks, Boise County, Idaho, shown outlined in yellow on the plat, or described in the description, or both, hereto attached and made a part hereof; RESERVING, however, to the Lessor the right to place and maintain at prominent places on the leased premises signs advertising Union Pacific Railroad Company.

Rental. Section 2. The Lessee agrees to pay for the use of said premises, rental at the rate of - - - - - - FIFTY-FIVE AND NO/100- - - - - - - - - - - Dollars ($ 55.00- - - -) per annum, payable to Union Pacific Railroad Company annually in advance. Acceptance of said rental in advance by the Lessor shall not act as a waiver of its right to terminate this lease as hereinafter provided. It is agreed that no improvements placed upon the leased premises by the Lessee shall become a part of the realty and the Lessee agrees to pay, before the same become delinquent, all taxes and all assessments levied and assessed during the continuance of this lease upon any buildings and other improvements placed upon the leased premises.

Use of Leased Premises. Section 3. The Lessee covenants that the leased premises shall not be used for any other purpose than for

Abandonment. --- Log Loading Site --- and agrees that if the Lessee abandons the leased premises, the Lessor may enter upon and take possession of the same, and that a non-user for the purpose mentioned, continuing for thirty days shall be sufficient and conclusive evidence of such abandonment.

Lessee Not to Sublet or Assign. Section 4. The Lessee agrees not to let or sublet the leased premises, in whole or in part, or to assign this lease without the consent in writing of the Lessor, and it is agreed that any transfer or assignment of this lease, whether voluntary, by operation of law or otherwise, without such consent in writing, shall be absolutely void and, at the option of the Lessor, shall terminate this lease.

Use for Unlawful Purposes Prohibited. Indemnity. Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof.

Care of Premises and Improvements. Section 6. The Lessee hereby covenants and agrees that any and all buildings erected upon the leased premises shall be painted by the Lessee a color satisfactory to the Lessor, and shall at all times be kept in good repair; that the roof of each such building shall be of fire-resistive material; that when such buildings are without solid foundation the openings between the ground and the floor thereof shall be covered with fire-resistive material; that the leased premises shall during the continuance of this lease be kept by the Lessee in a neat and tidy condition and free from all straw, rubbish, or other material which would tend to increase the risk of fire or give the leased premises an untidy appearance; that none of the buildings or other structures erected on said premises shall be used for displaying circus posters or any signs or advertisements other than such notices and signs as may be connected with the business of the Lessee, and that such signs and notices shall be neat and shall be properly maintained.

...IMAGE ORIGINAL — RAILROAD COPY

Claims and Liens for Labor and Material.

Section 7. The Lessee shall fully pay for all materials joined or affixed to said premises, and shall pay in full all persons who perform labor upon said premises, and shall not permit or suffer any mechanic's or materialman's lien of any kind or nature to be enforced against said premises for any work done or materials furnished thereon at the instance or request or on behalf of the Lessee; and the Lessee agrees to indemnify and hold harmless the Lessor from and against any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

Clearances.

Section 8. No building, platform or other structure shall be erected or maintained and no material or obstruction of any kind or character shall be placed, piled, stored, stacked or maintained closer than eight (8) feet six (6) inches to the center line of the nearest track of the Lessor; PROVIDED, however, that in the case of platforms not higher than four (4) feet above the top of the rail a minimum clearance of seven (7) feet three (3) inches from the center line of the nearest track of the Lessor will be permitted; and PROVIDED further that along and adjacent to, and for one car length beyond, those portions of track having a curvature greater than ten (10) degree the clearances hereinbefore provided shall, with reference to platforms four (4) feet or less in height, be increased horizontally six (6) inches, and with reference to all buildings, platforms, structures and other obstructions greater than four (4) feet in height shall be increased horizontally one (1) foot; and PROVIDED further that if by statute or order of competent public authority greater clearances shall be required than those provided for in this Section 8, then the Lessee shall strictly comply with such statute or order. All doors, windows or gates shall be of the sliding type or shall open toward the inside of the building or enclosure when such building or enclosure is so located that the said doors, windows or gates if opening outward, would, when opened, impair the clearances in this section prescribed.

Explosives and Inflammables.

Section 9. It is further agreed that no gunpowder, gasoline, dynamite, or other explosives or inflammable material shall be stored or kept upon the leased premises. Nothing herein contained, however, shall prevent the storage of oil or gasoline upon the leased premises when the purpose for which the same are to be used, as indicated by Section 3 hereof, contemplates such storage; nor the storage of oil or gasoline where same are used by the Lessee for fuel in the business carried on by the Lessee on the leased premises, and are stored in quantities reasonable for such purpose; PROVIDED, however, that in all of said excepted cases, the Lessee shall strictly comply with all statutory and municipal regulations relating to the storage of such commodities.

No Constructions by Lessee Over or Under Tracks.

Section 10. The Lessee shall not locate or permit the location or erection of any poles upon the property of the Lessor, nor of any beams, pipes, wires, structures or other obstruction over or under any tracks of the Lessor without the consent of the Lessor.

Liability of Lessee for Breach.

Section 11. The Lessee shall be liable for any and all injury or damage to persons or property, of whatsoever nature or kind, arising out of or contributed to by any breach in whole or in part of any covenant of this agreement.

No Other Railroad to Use Tracks.

Section 12. No railroad company other than the Lessor shall be allowed to use any track owned or built by the Lessor now or hereafter upon or extending to any part of the leased premises, without the permission in writing of the Lessor.

Fire Damage Release.

Section 13. It is understood by the parties hereto that the leased premises are in dangerous proximity to the tracks of the Lessor, and that by reason thereof there will be constant danger of injury and damage by fire, and the Lessee accepts this lease subject to such danger.

It is therefore agreed, as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumes all risk of loss, damage or destruction of or to buildings or contents on the leased premises, and of or to other property brought thereon by the Lessee or by any other person with the knowledge or consent of the Lessee and of or to property in proximity to the leased premises when connected with or incidental to the occupation thereof, and any incidental loss or injury to the business of the Lessee, where such loss, damage, destruction or injury is occasioned by fire caused by, or resulting from, the operation of the railroad of the Lessor, whether such fire be the result of defective engines, or of negligence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employe of the Lessor, or otherwise, and the Lessee hereby agrees to indemnify and hold harmless the Lessor from and against all liability, causes of action, claims, or demands which any person may hereafter assert, have, claim or claim to have, arising out of or by reason of any such loss, damage, destruction or injury, including any claim, cause of action or demand which any insurer of such buildings or other property may at any time assert, or undertake to assert, against the Lessor.

Water Damage Release.

Section 14. The Lessee hereby releases the Lessor from all liability for damage by water to the leased premises or to property thereon belonging to or in the custody or control of the Lessee, including buildings and contents, regardless of whether such damage be caused or contributed to by the position, location, construction or condition of the railroad, roadbed, tracks, bridges, dikes, ditches or other structures of the Lessor.

Termination on Default.

Section 15. It is further agreed that the breach of any covenant, stipulation or condition herein contained to be kept and performed by the Lessee, shall, at the option of the Lessor, forthwith work a termination of this lease, and all rights of the Lessee hereunder; that no notice of such termination or declaration of forfeiture shall be required, and the Lessor may at once re-enter upon the leased premises and repossess itself thereof and remove all persons therefrom or may resort to an action of forcible entry and detainer, or any other action to recover the same. A waiver by the Lessor of the breach by the Lessee of any covenant or condition of this lease shall not impair the right of the Lessor to avail itself of any subsequent breach thereof.

Termination by Notice.

Section 16. This lease may be terminated by written notice given by either the Lessor or the Lessee to the other party on any date in such notice stated, not less, however, than thirty (30) days subsequent to the date on which such notice shall be given. Said notice may be given to the Lessee by serving the Lessee personally or by posting a copy thereof on the outside of any door in any building upon the leased premises or by mailing said notice, postage prepaid, to the Lessee at the last address known to the Lessor. Said notice may be given to the Lessor by mailing the same, postage prepaid, to the office of the General Manager of the District of the Lessor in which the leased premises are located. Upon such termination and vacation of the premises by the Lessee, the Lessor shall refund to the Lessee on a prorata basis any unearned rental paid in advance.

Vacation of Premises.

Removal -

Lessee

the Sec.

the Lessor ... Lessee, the ...

Vacation of Premises. Removal of Lessee's Property.

Section 17. The Lessee covenants and agrees to vacate and surrender the quiet and peaceable possession of the leased premises on the termination of this lease howsoever. Within thirty (30) days after the termination of this lease, the Lessee shall remove from the premises all structures and other property not belonging to the Lessor, and shall restore the surface of the ground to as good condition as the same was in before such structures were erected, all at the expense of the Lessee. In case of the Lessee's failure so to do, all such structures and other property shall, upon the termination of said thirty (30) days, become and thereafter remain the property of the Lessor.

Special Provisions.

APPROVED

SUPERINTENDENT

Successors and Assigns.

Section 18. It is further agreed that by the word "Lessee" is meant the party or parties of the second part herein and signing this agreement, and his, its, or their heirs, executors, administrators, successors or assigns, and that all of the terms and conditions of this agreement shall inure to the benefit of the Lessor, and the successors and assigns of the Lessor, or any railroad company whose line of railroad the Lessor may be operating under any arrangement of any kind or nature whatsoever.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed, the day and year first herein written.

OREGON SHORT LINE RAILROAD COMPANY

UNION PACIFIC RAILROAD COMPANY,

Witness: M. Leishman

By C. Dawson
General Manager.

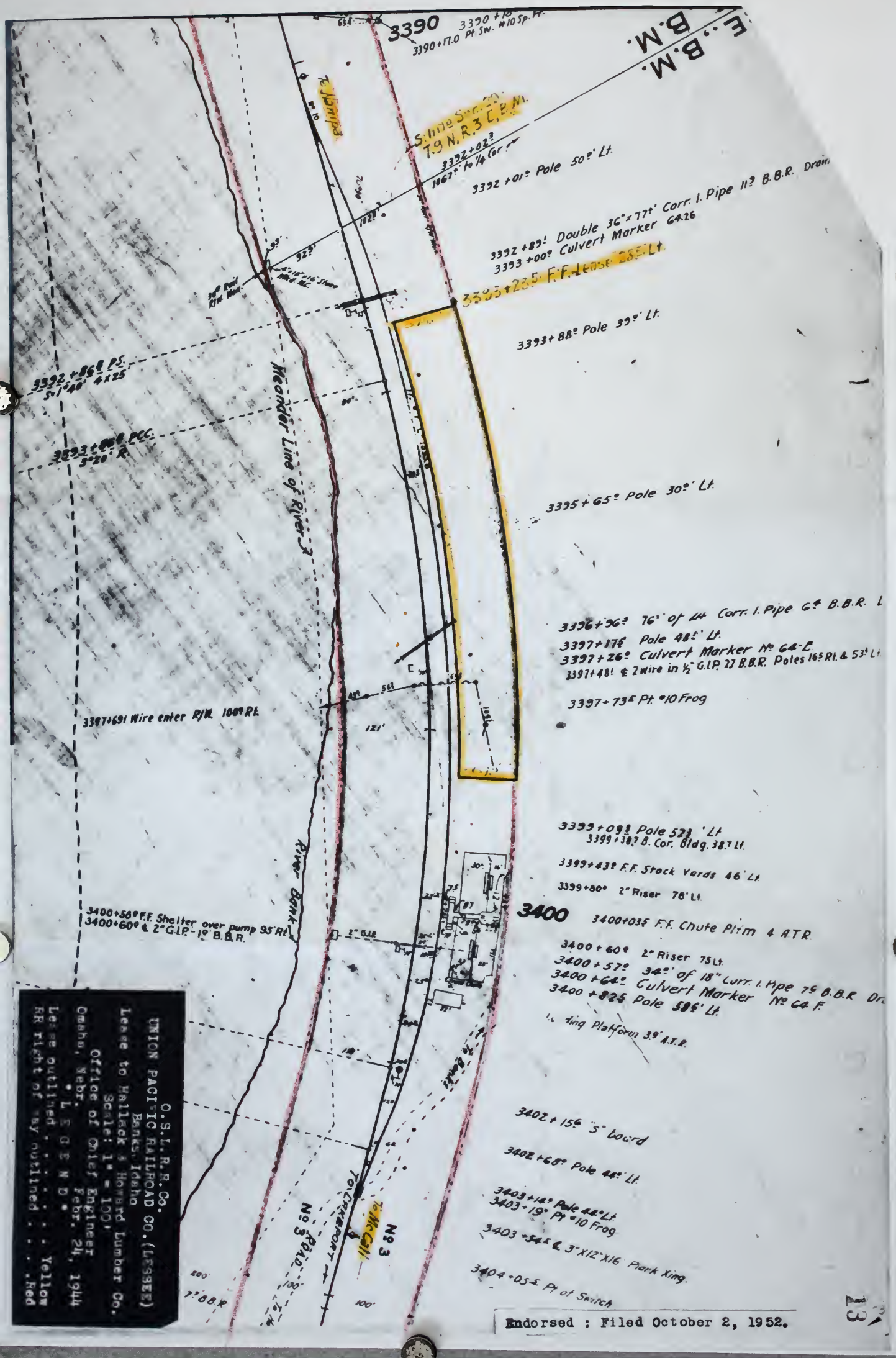
THE HALLACK & HOWARD LUMBER CO.

Witness: L. F. Roach

By R. Dalgleish

Its Pres.

Attest:
T. C. Clarens
Secretary



Endorsed : Filed October 2, 1952.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Defendant:

You are hereby summoned and required to serve upon Bryan P. Leverich, 10 South Main St., Salt Lake City, Utah, and L. H. Anderson, E. H. Casterlin, and E. C. Phoenix, P.O. Box 530, Pocatello Idaho, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 3, 1952.

[Seal] ED. M. BRYAN,
Clerk of Court.

/s/ BILLIE BRYAN,
Deputy Clerk.

Return on service of writ attached.

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendant herein moves the Court as follows:

I.

To dismiss the above-entitled action upon the following grounds:

A? That the complaint as drawn fails to state

a claim against the Defendant upon which relief can be granted.

II.

This Motion is made upon the records and files in this cause.

Dated this 24th day of October, 1952.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant.

[Endorsed]: Filed October 28, 1952.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed By and between the Attorneys of Record for the Plaintiffs, and the Attorney for the Defendant in the above-entitled action as follows:

1. The Plaintiffs hereby waive any notice of a motion by the Defendant to bring in W. O. Bedal as a Third Party Defendant in this action.

2. The Plaintiffs hereby consent to the Court entering an order bringing in the said W. O. Bedal as a Third Party Defendant.

Dated this 27th day of October, 1952.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. H. CASTERLIN,
/s/ E. C. PHOENIX,
Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant.

[Endorsed]: Filed October 28, 1952.

[Title of District Court and Cause.]

MINUTE ORDER—NOVEMBER 14, 1952

Comes now Oscar W. Worthwine into open Court and presents to the Court Motion and Order to bring in a Third Party Defendant. The Court being fully advised in the premises signed the Order as presented and ordered the same filed herein.

[Title of District Court and Cause.]

MOTION TO BRING IN THIRD PARTY DEFENDANT

Defendant, The Hallack and Howard Lumber Company, a corporation, moves for leave to make W. O. Bedal, a citizen and resident of the State of Idaho, a Party to this action, and that there be served upon him Summons and Third Party Complaint as set forth in Exhibit "A" hereto attached.

Dated this 31st day of October, 1952.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant, The Hallack and Howard Lumber Company

ORDER

Upon reading the foregoing Motion and good cause appearing therefor,

It Is Hereby Ordered That W. O. Bedal be made a party to this action, and that Summons and Third Party Complaint as attached to Defendant's Motion be served upon said Third Party Defendant, W. O. Bedal.

Dated this 14th day of November, 1952.

/s/ CHASE A. CLARK,
District Judge.

EXHIBIT "A"

United States District Court for the District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

THIRD PARTY COMPLAINT

First Count

I.

That the Plaintiffs, Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, have filed against the Defendant, The Hallack and Howard Lumber Company, a corporation, a complaint, a copy of which is attached hereto as Exhibit "C."

II.

That on or about March 31, 1945, the Defendant and Third Party Plaintiff, The Hallack and How-

ard Lumber Company, a corporation, as Party of the First Part, entered into a logging contract with Owen S. Smith and W. O. Bedal, as Parties of the Second Part, under the terms of which the said Third Party Defendant, W. O. Bedal, and the said Owen S. Smith agreed to cut and load certain logs upon railroad cars at Banks, Boise County, Idaho, and that by the Fifth Amendment to said logging contract dated the 7th day of May, 1949, the Third Party Defendant, W. O. Bedal, was substituted for and in the place of himself and the said Owen S. Smith, and assumed all of the obligations contained in said logging contract dated March 31, 1945. That a copy of said logging contract is hereto attached and marked Exhibit "D."

III.

That under the terms and conditions of said logging contract it was stipulated and agreed as follows:

> "It is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed

that this is what is commonly termed and called an independent contractor's agreement."

and said logging contract also provided:

"Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract."

IV.

That under the terms and provisions of said logging contract the said W. O. Bedal was at all times after May 7, 1949, an independent contractor having charge and control of the premises which were leased to the Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, and described in the complaint, a copy of which is hereto attached as Exhibit "C."

V.

That on or about the 15th day of September, 1949, while the aforesaid logging contract between The Hallack and Howard Lumber Company and the said W. O. Bedal was in full force and effect, while acting as an independent contractor, the Third Party Defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises at Banks, Boise County, Idaho, and that while so unloading said logs under the terms and conditions

of said logging contract between him and the said Defendant and Third Party Plaintiff, a piece of timber broke off one of the logs being so unloaded and struck one A. M. Powell, an employee of the Union Pacific Railroad Company, a corporation, seriously injuring the said A. M. Powell, and that as a result of said accident the judgment set forth and described in the complaint of the Plaintiffs herein was obtained against the Union Pacific Railroad Company at the time and in the manner set forth in the complaint herein, a copy of which is attached as Exhibit "C."

VI.

That by reason of said logging contract between the Defendant and Third Party Plaintiff and the said W. O. Bedal, Third Party Defendant, the said W. O. Bedal was, is, or may be, liable to the said Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, for any sums recovered against the said Defendant and Third Party Plaintiff by the Plaintiffs herein.

VII.

That this claim arises out of the transactions and occurrences that are the subject-matter of the original complaint on file herein, a copy of which is hereto attached as Exhibit "C."

VIII.

That this Defendant and Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, does not believe that it is liable to the

Plaintiffs herein, but in the event the Plaintiffs, or either of them, recover a judgment or judgments against this Defendant and Third Party Plaintiff, that it will be entitled to a judgment or judgments against the Third Party Defendant, W. O. Bedal, for the total sum of said judgment or judgments.

IX.

That this Defendant and Third Party Plaintiff on October 14, 1952, by an instrument in writing, tendered the defense of this action to the said W. O. Bedal, and his insurance carrier, the Truck Insurance Exchange, and they severally refused to defend it; that a copy of said tender is attached hereto as Exhibit "E."

X.

That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.

That on April 25, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho,

Southern Division, referred to in the complaint of the Plaintiffs in this action.

That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

> "This letter is to advise you that The Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless The Hallack and Howard Lumber Company from any liability whatever in this matter."

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit "F," and by this reference is hereby made a part hereof.

That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

That the said cause of A. M. Powell, Plaintiff,

versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951.

Second Count

In the alternative, and as a second count, the Defendant and Third Party Plaintiff alleges:

I.

The Defendant and Third Party Plaintiff hereby incorporates by this reference all of the allegations contained in the above First Count.

II.

That if the Third Party Defendant is not liable to this Defendant and Third Party Plaintiff upon the above First Count, he is or may be liable to this Defendant and Third Party Plaintiff by way of subrogation and upon an implied contract based upon the following facts:

That the Third Party Defendant was an independent contractor for a long time prior to and on September 15, 1949, and he, his servants, agents and employees, had the exclusive charge and control of a log loading bunker at Banks, Boise County, Idaho, and that he, his servants, agents and employees, negligently permitted said log bunker to become filled with bark, limbs, dirt and other debris so that it would not properly stop logs rolled down an incline to the tracks of the Union Pacific Rail-

road Company, and negligently failed to remove from said logs the splinter that injured the said A. M. Powell, and that the Third Party Defendant's method of unloading logs from trucks down said incline, with splinters on them, was hazardous and dangerous to life and limb, and as a result of the said negligence of the Third Party Defendant, his servants, agents and employees, in so maintaining said log bunker and in unloading logs from his trucks on September 15, 1949, the said A. M. Powell was seriously injured, resulting in the judgment referred to and described in Plaintiff's complaint herein;

That at said time the said Third Party Defendant was not a servant, agent or employee of this Defendant and Third Party Plaintiff, and none of his employees were servants, agents or employees of this Defendant and Third Party Plaintiff; that this Defendant and Third Party Plaintiff had no part in the unloading of the said log or logs that caused the injury to the said A. M. Powell, and in no way, directly or indirectly, contributed to said injuries. That the said negligence of the Third Party Defendant, his servants, agents and employees, was the active, direct, proximate and primary cause of the injuries to the said A. M. Powell.

Wherefore, This Defendant and Third Party Plaintiff prays:

First, for judgment against the Third Party Defendant, W. O. Bedal, for any and all amounts for which judgment may be entered against it;

Second, for attorneys fees and costs expended by this Defendant and Third Party Plaintiff.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant and
Third Party Plaintiff.

EXHIBIT C

[Exhibit C attached is identical to Complaint Cause No. 2944 see page 3 of this printed record.]

EXHIBIT "D"

LOGGING CONTRACT

This Agreement, made and entered into this 31st day of March, 1945, by and between The Hallack & Howard Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado and authorized to do business in the State of Idaho, party of the first part, and Oliver Bedal and Owen S. Smith of Council, Idaho, parties of the second part, Witnesseth:

That in consideration of One Dollar ($1.00), paid by one to the other, receipt of which is hereby acknowledged, and other good and valuable considerations as hereinafter mentioned, the parties of the second part, contracts and agrees with the party of the first part as follows:

The parties of the second part agree to cut, skid, haul, and deliver to the railroad at Banks, Idaho,

Exhibit "D"—(Continued)

what is known as the Banks landing, and load on railroad cars all of the timber the party of the first part has now purchased from the United States Forest Service, what is known as the Danskin area, and the remaining small amount of timber now cut in what is known as the Big Pine area, amounting to about Fifteen (15) Million Feet more or less.

The timber now owned by the party of the first part is more specifically described as the timber purchased from the United States Forest Service located in Sections 13-14-22-23-24-25-26-27-34-35 and 36, Township 9 North, Range 5 East, and Sections 18 and 19, Township 9, Range 6 East.

It is also agreed that the parties of the second part agree to unload from the trucks and reload all the logs delivered to Banks, Idaho, landing which may be delivered by Logan Wakefield, logging contractor, or any other party who may deliver logs to Banks, Idaho, and for such logs the parties of the second part load on cars; it is agreed that the price paid by the party of the first part will be One Dollar ($1.00) per M for all such work.

It is understood by this contract that the party of the first part agrees to be responsible for the disposal of brush and slashing of all the timber cut under this contract.

The Second parties agree to begin the necessary repairing of equipment, securing a crew of employees, building roads and falling of timber possible, and doing all necessary work possible during the winter and spring months in order to have suffi-

Exhibit "D"—(Continued)

cient logs and roads ahead to carry on a continuous delivery of logs to Banks, Idaho, as soon as the logging trucks can be operated.

The parties of the second part agree to deliver to the Banks land not less than Eighty (80) Thousand Feet of logs per day or about Two (2) Million per month and it is also agreed by both parties of this contract that the party of the first part will accept any additional logs the second parties are able to deliver per day or per month.

It is also agreed that in case logs cannot be delivered to the log pond or at the Banks landing during the winter months, the parties of the second part may continue delivering logs, decking same, but no additional compensation shall be paid for such logs so delivered and decked.

It is agreed that the price to be paid by the party of the first part to the parties of the second part for said log delivery at the Banks landing and loaded on railroad cars by the parties of the second part under the terms of this Agreement is to be Fifteen Dollars ($15.00) per M, which price is hereby agreed to be the full and complete compensation payable by the party of the first part to the parties of the second part for all of their services covering the entire operation from the cutting of the timber to the landing and loading of logs on railroad cars at Banks, Idaho.

Payments under this contract shall be made by the party of the first part to the parties of the second part for all log delivery to the Banks landing and loading on railroad cars during each month,

Exhibit "D"—(Continued)

such payment to be made on the 15th day of the following month.

The scaling of logs under this contract shall be performed by a representative of the first party at the time of the delivery at the Banks landing. The scaling used shall be the Decimal C System, the same as is used by the United States Forest Service in scaling logs under its contract with the party of the first part.

Second parties agree that they will keep a check scale and a log count of the logs cut and delivered by them to the first party and that they will at least once each week check their scale and log count with that of the scaler of the first party to the end that there can be no variations in the scale and count kept by the second parties and that kept by the first party except such variations that is commonly known to exist between two or more different scalers and that the second parties shall at once advise the manager of the first party at Cascade, Idaho, of any claim or variations in the second parties' scale and count with that of the scaler of the first party and that unless second parties file a written statement with the said manager of the first party of their claim of variations within ten (10) days after the expiration of any week in which they claim there was a variation, they shall be conclusively deemed to have waived any claim of under scaling or count by the scaler of the first part.

It is agreed that the first party hereby reserves the right, and has the right, in case of bad market-

Exhibit "D"—(Continued)

ing conditions or control of production by any government agency, or for any other cause or reason beyond the control of the party of the first part, to notify the second parties to discontinue logging operations temporarily at any time during the continuance of this contract. It is further provided that the second parties shall be given thirty (30) days' notice before ceasing their operations and that they will be given the same notice in advance of resuming operations under this contract.

It is agreed that the party of the first part will sell the parties of the second part any and all logging equipment needed by the parties of the second part of any extra or surplus equipment owned by the party of the first part at a fair and reasonable price, and the parties of the second part agree to give the party of the first part their note and mortgage covering the security of any equipment purchased.

The parties of the second part agree to pay the first party One Dollar and Fifty Cents ($1.50) per M of all logs delivered each month as payment on the purchase of such equipment and it is also agreed that the parties of the second part have a right to pay off any balance due for the equipment at their option.

It is agreed by the parties of the second part that in the event this contract is not carried through to completion and the parties of the second part should decide to resell any or all of the equipment they have in their possession purchased from the party of the first part that they will guarantee that all

Exhibit "D"—(Continued)

of such equipment will be in as good a condition as when the party of the first part sold the equipment to the parties of the second part.

The first party hereby agrees to furnish second parties upon request any lumber that they may need for the building of camp or camps or for use in their logging operation at wholesale price for the various kinds of grades used, and it is agreed that by wholesale price is meant the price at which it sells lumber at wholesale to the retail yard of the Boise Payette Lumber Company at Cascade, Idaho.

Second parties agree that all of their logging operations under this contract shall be under the direction of first party, depending on the necessity caused by weather conditions, and that subject to governing weather conditions they will operate first in that part of the timber which is an average of the entire tract so far as difficulty of expense and operation is concerned, and that such cutting as to location shall be performed under the instructions and guidance of the first party.

Second parties agree that during the months of June, July and August while there is danger of sap stain, the timber shall be felled only so fast as it is moved to the landing, and that under no circumstances will timber be allowed to remain on the ground after felling without being rolled out and decked when necessary so as to avoid any possibility of sap stain. It is further agreed that all logs shall be cut in such lengths as is required and directed by the first party. It is hereby agreed that the avoidance of sap stain and the cutting of logs in

Exhibit "D"—(Continued)

such lengths as is directed by first party is of great importance to the first party and will be fully and carefully complied with by the second parties.

It is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement.

The parties of the second part agree to procure in a manner satisfactory to the officers of the State of Idaho having charge of the administration of the Workmen's Compensation Act, workmen's compensation for all of his employees to be employed in said logging operations, and also to comply fully with all federal and state laws, rules and regulations regarding compensation of employees.

The parties of the second part agree to furnish at any time upon the request of the first party, their time books, books of account, receipted bills, vouchers, checks, and all other and full and complete information concerning the employment of labor, the purchase of equipment, and the carrying on of work under this contract, as well as to give

Exhibit "D"—(Continued)

to the party of the first part full and complete information as to their financial condition and the progress made by the second parties in the discharge of all of their financial obligations in regard to the cutting, hauling and delivery of said logs and all of the other terms of this contract, and second parties agree to fully and completely advise the first party as to the possibility and/or probability of any claims of indebtedness against said parties of the second part becoming a lien upon said logs. The parties of the second part hereby grant and give to the party of the first part the full and complete right to inspect said books, vouchers, checks and accounts in order to ascertain the amount due and which may become due to any person whatsoever on account of second parties being engaged in said logging operations.

Second parties agree that all logging operations shall be performed as to fire protection strictly under the rules in effect, or to be put into effect, by the United States Forest Service, and under any rules, regulations or requirements of the State of Idaho, and the second parties agree at their own expense to provide their trucks with fire fighting equipment when necessary to comply with any rules or regulations of any governmental body, and to furnish men for fire fighting whenever required by any rules, regulations, or the officers of any governmental body, and the second parties hereby agree to compensate said first party for any loss or damage caused by fire or otherwise by any of their employees.

Exhibit "D"—(Continued)

Second parties also agree to comply in every respect with any and all requirements as to wages, hours of employment of labor, and any and all other regulations which now are or hereafter may be promulgated by the United States or the State of Idaho, or any legal subdivision of either, or by any governmental agency or bureau. Second parties agree to comply with the laws and regulations set up or hereafter to be set up by the Social Security Board under either state or federal laws, rules or regulations, and further agree to assume all responsibility for taxes, fees, charges and workmen's compensation premiums on labor under all Social Security laws. Second parties hereby agree that any and all subcontractors employed by them shall be required to comply strictly with all the requirements in this contract, including those relating to all the rules and regulations of the United States and/or the State of Idaho and any and all agencies and bureaus of the United States and/or the State of Idaho.

Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use, and will at their own expense provide each truck with all equipment for safe opera-

Exhibit "D"—(Continued)

tion and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof.

Second parties further agree to do all necessary work in building roads and bridges and keeping roads in repair; it being understood however, that the first party is to stand such expense as may be necessary to secure rights-of-way over privately owned lands between the present existing roads and the timber; it being agreed, however, that second parties shall not incur or contract for any expense in procuring rights-of-way without first consulting with the Superintendent of the party of the first part and securing the permission of the party of the first part.

No assignment of this contract shall be valid without the written consent of both parties hereto.

It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second part in the time and in the manner and in the method hereinbefore specified is of great importance to the first party, and in the event of the failure of the parties of the second part to perform any of the terms of this contract by them to be performed, the party of the first part shall have the right at its option, by written notice to the parties of the second part, to terminate this contract within thirty (30) days.

In Witness Whereof, the parties have hereunto

Exhibit "D"—(Continued)

set their hands and seals the day and year first above written.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation,

By /s/ G. DOWNER,
Vice-Pres.,
Party of the First Part.

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL,
Parties of the Second Part.

Witness:

/s/ U. R. ARMSTRONG,

/s/ L. A. McMILLAN.

AMENDMENT TO LOGGING CONTRACT

The following is an amendment to now existing logging contract between The Hallack & Howard Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado and authorized to do business in the State of Idaho, party of the first part, and Oliver Bedal and Owen S. Smith of Council, Idaho, parties of the second part.

The fifth paragraph, counting from the top of page 2, is amended to read as follows:

> It is agreed that the price to be paid by the party of the first part to the parties of the second part for said logs delivery at the Banks landing and loaded on railroad cars by the

Exhibit "D"—(Continued)

parties of the second part under the terms of this agreement is to be Seventeen Dollars ($17.00) per M, which price is hereby agreed to be the full and complete compensation payable by the party of the first part to the parties of the second part for all of their services covering the entire operation from the cutting of the timber to the landing and loading of logs on railroad cars at Banks, Idaho.

The third paragraph counting from the top of page 3, is amended to read as follows:

It is agreed that the first party hereby reserves the right, and has the right, in case of bad marketing conditions or control of production by any government agency, or for any other cause or reason beyond the control of the party of the first part, to notify the second parties to discontinue logging operations temporarily at any time during the continuance of this contract. It is further provided that the second parties shall be given ten (10) days' notice before ceasing their operations and that they will be given the same notice in advance of resuming operations under this contract.

The second paragraph counting from the top of page 4, is amended to read as follows:

The parties of the second part agree to pay the first party Two Dollars and Fifty Cents ($2.50) per M of all logs delivered each month as payment on the purchase of such equipment

Exhibit "D"—(Continued)

and it is also agreed that the parties of the second part have a right to pay off any balance due for the equipment at their option.

The first paragraph counting from the top of page 8, is amended to read as follows:

It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second party in the time and in the manner and in the method hereinbefore specified is of great importance to the first party, and in the event of the failure of the parties of the second part to perform any of the terms of this contract by them to be performed, the party of the first part shall have the right at its option, by written notice to the parties of the second part, to terminate this contract within ten (10) days.

This amendment to become effective as of September 1, 1945, and to apply to the Danskin Creek area only.

In Witness Whereof, the parties have hereunto set their hands and seals this 29th day of Sept., 1945 A.D.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation.

By /s/ J. F. DOWNER,
Vice-Pres.,
Party of the First Part.

/s/ OWEN S. SMITH,

Exhibit "D"—(Continued)

/s/ W. O. BEDAL,

Parties of the Second Part.

Witness:

/s/ U. R. ARMSTRONG.

Amendment to an Amendment

The following is an amendment to an amendment to a now existing contract dated 31st day of March, 1945, and amendment dated the 29th day of September, 1945, between the Hallack & Howard Lumber Company, a corporation organized and authorized to do business in the State of Idaho, party of the first part, and Owen S. Smith and W. O. Bedal now of Garden Valley, Idaho, parties of the second part:

The parties of the second part agree to cut, skid, haul and deliver to the railroad at Banks, Idaho, which is known as the Banks landing, and load on railroad cars all of the timber the party of the first part now has purchased or contracted from the United States Forest Service, what is known as the Bunch Creek, Horn Creek and Wash Creek area estimated to be ten (10) million feet more or less.

The timber purchased or now contracted by the party of the first part is more specifically described as in Sections 1-12-13-14 and 24, Township 8 North, Range 4 East, and Sections 7-8-17-18-19-20 and 30, Township 8 North, Range 5 East.

The parties of the second part also agree to cut, skid, haul and deliver to the railroad at Banks, Idaho, and load on cars any other timber that may be contracted or purchased by the party of the first

Exhibit "D"—(Continued)

part in that same locality which is about the average logging condition.

It is agreed the parties of the second part are to pay all cost of moving and building camp, building of roads, culverts and bridges and any and all other costs with the exception of paying the cost and securing logging road right-of-way which the party of the first part agrees to pay.

The price to be paid by the party of the first part to the parties of the second part for the entire logging operation from tree to the loading of logs on cars at Banks, Idaho, is to be Seventeen Dollars ($17.00) per M.

It is understood logging operations will be permitted to start in Bunch, Horn and Wash Creeks area just as soon as the present Danskin Creek contract is completed to the entire satisfaction of the party of the first part and the United States Forest.

Aside from the above changes, all other provisions of the now existing contract known as the Danskin area contract dated March 31, 1945, and the amendment dated September 29, 1945, are to remain exactly the same.

In Witness Whereof, the parties have hereunto set their hands and seals this 14th day of December, 1945.

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation.

By /s/ U. R. ARMSTRONG,
Manager, Party of the First Part.

Exhibit "D"—(Continued)

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL,

Parties of the Second Part.

Witness:

/s/ O. M. CARLSON,

/s/ J. A. HOOD.

Third Amendment to Existing Logging Contract

The following is a third amendment to a now existing contract dated 31st day of March, 1945, amendment dated the 29th day of September, 1945, and amendment dated the 14th day of December, 1945, between the Hallack & Howard Lumber Company, a corporation organized and authorized to do business in the State of Idaho, party of the first part, and Owen S. Smith and W. O. Bedal, now of Garden Valley, Idaho, parties of the second part:

The parties of the second part agree to cut, skid, haul and deliver to the Railroad at Banks, Idaho, which is known as the Banks landing, and load on railroad cars all of the timber the party of the first part now has purchased or contracted from the United States Forest Service, known as the Scriver Creek and Six Mile Creek timber tract estimated to be Seventeen (17) Million feet more or less.

The timber under contract and to be cut, skidded, hauled and loaded on cars is to be all species marked by the U. S. Forest Service for cutting.

The timber purchased or now under contract by

Exhibit "D"—(Continued)

the party of the first part is more specifically described as in Sections 5-6-7-9-17-18-19-20 and 30, Twp. 10 N., Range 4 East; Sections 27-28-29-31-32-33 and 34, Twp. 11 North, Range 4 East, all in the Scriver Creek drainage, and Sections 10-11-12-13-14-15 and 22, Twp. 11 N., Range 4 East; Sections 7 & 18, Twp. 11 North, Range 5 East. All in Six Mile Creek drainage.

In addition to the above-described areas this contract also covers any timber outside the sale boundary agreed upon to take between the parties of the second part and the U. S. Forest Officer in charge.

The parties of the second part also agree to cut, skid, haul and deliver to the Banks landing and load on cars any other timber that may be contracted or purchased by the party of the first part in that same locality which is of about the average logging condition.

The price to be paid by the party of the first part to the parties of the second parties for the entire logging operation from tree to the loading of logs on the railroad cars at Banks, Idaho, is to be Nineteen Dollars ($19.00) per M.

It is understood logging operations will be permitted to start in Scriver Creek and Six Mile Creek area just as soon as the present contract on Bunch, Horn and Wash Creeks is completed to the entire satisfaction of the party of the first part and the United States Forest Service.

Aside from the above changes, all other provisions of the now existing contract dated March

Exhibit "D"—(Continued)

14th, 1945, are to remain exactly the same.
and amendment to amendment dated December 31st, 1945, amendment dated September 29th, 1945,

Witness Whereof, the parties have hereunto set their hands and seal this ..... day of February, 1947.

THE HALLACK & HOWARD LUMBER CO., a Corporation.

/s/ U. R. ARMSTRONG,
Manager,
Party of the First Part.

/s/ OWEN S. SMITH,

/s/ W. O. BEDAL.

Witness:

/s/ W. H. PATTERSON,

/s/ J. L. WILLIAMS,

/s/ H. N. SMITH,

/s/ JOEL R. FISHER.

45

15

FOURTH AMENDMENT TO EXISTING
LOGGING CONTRACT

The following is a FOURTH amendment to a new existing contract d March 31, 1945; amended September 29, 1945; amended December 14, ; and amended February 24, 1947, between THE HALLACK AND HOWARD LUMBER ANY, a corporation organized and authorized to do business in the e of Idaho, party of the First part, and Owen S. Smith and W. O. Bodel, of Orouch, Idaho, parties of the second part; WITNESSETH:

The seventh or last paragraph from the top of page 1 of the [redacted] MENT is hereby amended to read as follows:

The price to be paid by the party of the first part to the parties of the second part for the entire logging operation from tree to the loading of logs [redacted] cars at Banks, Idaho is to be TWENTY AND 00/100 DOLLARS ($20.00) per M., for the year 1948.

This amendment is to become effective with the start of the 1948 ting season and to apply for the year 1948.

IN WITNESS WHEREOF, the parties have [redacted] and [redacted] this 22d day of July 1948.

THE HALLACK AND HOWARD LUMBER COMPANY

by W. R. Compton
Party of the First Part

Owen S. Smith
W O Bodel
Parties of Second Part

Witnesses:

Helen M. Smith

Exhibit "D"—(Continued)

Fifth Amendment to Existing Logging Contract

Whereas, the above and foregoing Logging Contract dated the 31st day of March, 1945, by and between the Hallack & Howard Lumber Company, a corporation, as Party of the First Part, and Oliver Bedal and Owen S. Smith, as Parties of the Second Part, has been amended from time to time; and

Whereas, the Partnership heretofore existing between Oliver Bedal (W. O. Bedal) and Owen S. Smith has been dissolved, and it is desired that the above and foregoing logging contract and all of the amendments thereto be carried on and completed by W. O. Bedal;

Now, Therefore, for and in consideration of the premises, it is hereby agreed by and between the Parties hereto as follows:

I.

That W. O. Bedal shall be substituted for and in the place of himself and the said Owen S. Smith, and that the said Owen S. Smith shall have no further interest in and to the above and foregoing contract and all amendments thereto, and that the said W. O. Bedal shall continue under said contract and amendments, and discharge all the duties heretofore performed by him and the said Owen S. Smith, and the said Owen S. Smith shall be released

Exhibit "D"—(Continued)

from any and all further liability under said contract and all amendments thereto.

II.

It is further agreed that any and all payments hereafter made under said contract and amendments shall be made to the said W. O. Bedal individually, and that the said Owen S. Smith shall have no interest in said payments and no interest in said contract or any amendments thereto.

In Witness Whereof, the Parties hereto have hereunto set their hands and seals the 7th day of May, 1949.

HALLACK & HOWARD
LUMBER COMPANY,

By /s/ U. R. ARMSTRONG,

/s/ W. O. BEDAL,

/s/ OWEN S. SMITH.

Witnesses:

/s/ JEROME A. REININGER,

/s/ H. H. PRESTEL.

EXHIBIT "E"

Oscar W. Worthwine
Attorney and Counselor
Idaho Building

October 14, 1952.

Mr. Wm. O. Bedal
Crouch, Idaho
and
Truck Insurance Exchange
2229 State Street
Boise, Idaho

Dear Sirs:

Re: Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, vs. The Hallack and Howard Lumber Company, a corporation. No. 2944.

This is to advise you, and each of you, that the Union Pacific Railroad Company, a corporation, and the Oregon Short Line Railroad Company, a corporation, has commenced an action in the United States District Court, for the District of Idaho, Southern Division, against The Hallack and Howard Lumber Company, a corporation, and the Summons in said case was served on October 8, 1952.

I am attaching hereto a copy of the complaint to which no answer has as yet been filed by the Defendant, The Hallack and Howard Lumber Company.

As you know The Hallack and Howard Lumber Company was in no way responsible for the injuries suffered by A. M. Powell, at Banks, Boise County, Idaho, on September 15, 1949.

Under date of January 10, 1951, The Hallack and Howard Lumber Company advised Wm. O. Bedal of the pendency of the action by A. M. Powell and the demand by the Union Pacific Railroad Company that we defend that action and that the Union Pacific Railroad Company would attempt to compel The Hallack and Howard Lumber Company to pay any judgment entered against it in that action.

As you know by virtue of the logging contract entered into between The Hallack and Howard Lumber Company and Wm. O. Bedal and Owen S. Smith under date of March 31st, 1945, as amended on various occasions, and which Wm. O. Bedal assumed individually by the fifth amendment to said contract dated May 7, 1949, The Hallack and Howard Lumber Company was to be held harmless from any claims arising on account of the operations of Wm. O. Bedal, and in which contract Wm. O. Bedal further agreed that all trucks and drivers were to be covered by insurance to take care of public liability and property damage, such insurance to specifically name and protect The Hallack and Howard Lumber Company in case of possible accident involving persons or property not connected with or owned by the parties to the contract.

We have been advised by an Agent of the Truck

Insurance Exchange that the said Truck Insurance Exchange had issued to Wm. O. Bedal a Comprehensive General Liability Policy of insurance and that The Hallack and Howard Lumber Company was fully protected, and that Wm. O. Bedal and The Hallack and Howard Lumber Company was fully covered and protected on September 15, 1949, when A. M. Powell was injured.

This letter is to advise you, and each of you, that The Hallack and Howard Lumber Company hereby tenders to you, and each of you, the defense of the present pending action, and demands that you, and each of you, hold it harmless on account of said action, and that you, and each of you, appear in and defend the action now pending in the United States District Court, for the District of Idaho, Southern Division, as between the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, Plaintiffs, against The Hallack and Howard Lumber Company, Defendant.

That an appearance must be made within twenty (20) days from October 8th, 1952.

Yours very truly,

THE HALLACK AND
HOWARD LUMBER CO.

By /s/ OSCAR W. WORTHWINE,
Its Attorney.

OWW:dw

encls

EXHIBIT "F"

Registered Mail
Return Receipt Requested.

January 10, 1951.

Mr. W. Oliver Bedal
Crouch,
Idaho

Dear Mr. Bedal:

We enclose a copy of a Complaint in the case of A. M. Powell vs. Union Pacific Railroad Company, being No. 2776 on the docket of the United States District Court for the District of Idaho, Southern Division, for judgment against said Railroad in the sum of $45,000.00 for injuries sustained by Plaintiff as the result of being struck by a log at the log bunker near Banks, Idaho.

The Hallack and Howard Lumber Company has been advised by the Railroad Company that it will hold the Lumber Company liable under the terms of a Leasehold Agreement between the Railroad and The Hallack and Howard Lumber Company of the log loading site on which the log bunker referred to is located.

As you know, by virtue of the logging contract entered into between The Hallack and Howard Lumber Company, yourself and Owen S. Smith dated March 31, 1945, as amended on various occasions, and which you assumed individually by a Fifth Amendment to said logging contract dated

May 7, 1949, The Hallack and Howard Lumber Company was to be held harmless for any claims whatsoever incurred by you, your agents, servants, employees, etc., and further you agreed that all trucks and drivers were to be covered by insurance to take care of public liability and property damage, such insurance to specifically name and protect The Hallack and Howard Lumber Company in case of possible accident involving persons or property not connected with or owned by the parties to this contract. We understand that you did carry liability insurance as called for by the logging contract.

This letter is to advise you that The Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless The Hallack and Howard Lumber Company from any liability whatsoever in this matter.

We will appreciate it if you will advise us as to the liability insurance carried by you, the amount and the name of the insurance carrier.

Very truly yours,

PHELPS & PHELPS,

By HORACE F. PHELPS.

HFP:J

[Endorsed]: Filed November 14, 1952.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Idaho,
County of Ada—ss.

D. O. Wilcox, Being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of twenty-one years, and that she is a Clerk and Secretary employed at Boise, Idaho, by Oscar W. Worthwine, Attorney at law; that upon the 14th day of November, 1952, at the request of said Oscar W. Worthwine she deposited in the United States Post Office at Boise, Idaho, postage prepaid, Motion and Order to bring in W. O. Bedal as a Third-Party Defendant in the above-captioned matter, together with Summons and Third Party Complaint to:

L. H. Anderson,
Attorney at Law,
312 Carlson Building,
P O Box 530,
Pocatello, Idaho.

and that said envelope containing said documents was securely sealed and had sufficient postage thereon to carry the same to the above-named person at his address in Pocatello, Idaho, and that there is a United States mail route from Boise, Idaho, to said Pocatello, Idaho.

/s/ D. O. WILCOX.

Subscribed and Sworn to before me this 14th day of November, 1952.

[Seal] /s/ RANDALL WALLIS,
Notary Public for Idaho.

[Endorsed]: Filed November 18, 1952.

[Title of District Court and Cause.]

SUMMONS

To the Above-Named Third-Party Defendant:

You are Hereby Summoned and required to serve upon Bryan P. Leverich, 10 South Main Street, Salt Lake City, Utah, and L. H. Anderson, E. H. Casterline and E. C. Phoenix, 312 Carlson Building, P. O. Box 530, Pocatello, Idaho, Attorneys for Plaintiffs, and Oscar W. Worthwine, 401 Idaho Building, P. O. Box 737, Boise, Idaho, Attorney for Defendant and Third-Party Plaintiff, an Answer to the Third Party Complaint which is herewith served upon you, and an Answer to the Complaint of the Plaintiffs, a copy of which is herewith served upon you, within twenty (20) days after the service of this Summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Third Party Complaint.

[Seal] /s/ ED M. BRYAN,
Clerk of the Court.

By /s/ BILLIE BRYAN,
Deputy.

Dated November 14, 1952.

Return on Service of Writ attached.

[Endorsed]: Filed November 25, 1952.

[Title of District Court and Cause.]

MOTION TO DISMISS ORIGINAL COMPLAINT

Comes Now the third-party defendant and moves the Court as follows:

I.

To dismiss the complaint insofar as third-party defendant is concerned, upon the following ground:

A. That said complaint fails to state a claim against the third-party defendant upon which relief can be granted.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,
Attorneys for Third-Party Defendant.

Service and receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

Comes Now third party defendant and makes this motion for a more definite statement in the following particulars, to wit:

That in the first count of third party complaint, in Paragraph II thereof, it cannot be determined whether or not the negligence alleged consisted in permitting the log bunker to become filled with bark, limbs, dirt and other debris, or whether the negligence complained of consisted of failing to remove splinters from the logs, or whether the negligence complained of was the method of unloading the logs.

That third party defendant therefore moves for a more definite statement with reference to said acts of negligence.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION TO STRIKE

Third party defendant moves the Court that the first count of the third party complaint be stricken, on the ground that the same is not a proper proceeding in connection with the main suit herein and does not set forth facts which are material and pertinent as a third party action.

Third party defendant further moves the Court that the second count of the third party complaint be stricken, on the ground that the same is not a proper proceeding in connection with the main suit herein and does not set forth facts which are material and pertinent as a third party action.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the third-party defendant, and moves the Court as follows:

I.

To dismiss the first count of the third party complaint upon the following ground:

A. That said first count of said third party complaint fails to state a claim against the third party defendant upon which relief can be granted.

Third party defendant also moves the Court as follows:

I.

To dismiss the second count of the third party complaint upon the following ground:

A. That said second count of said third party complaint fails to state a claim against the third party defendant upon which relief can be granted.

This motion is made upon the records and files in this cause.

Dated this 12th day of January, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

Service and Receipt of Copy acknowledged.

[Endorsed]: Filed January 14, 1953.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated by and between Plaintiffs, the Defendant and Third-Party Plaintiff, and the Third-Party Defendant that the Defendant and Third-Party Plaintiff shall immediately file their Brief on the Motions now pending and that the Third-Party Defendant shall have thirty (30) days from this date within which to file his brief, and that the Plaintiffs shall have twenty (20) days thereafter within which to file and serve their brief.

Dated: February 25, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

Attorney for Defendant and Third-Party Plaintiff.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

Attorney for Third-Party Defendant.

ORDER

Pursuant to the foregoing Stipulation, it is Hereby Ordered that Defendant and Third-Party Plaintiff shall immediately file their Brief on the motions now pending, and that Third-Party Defendant shall have thirty (30) days from this date within which to file his brief, and that Plaintiffs shall have twenty (20) days thereafter within which to file and serve their brief.

Dated: February 27th, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed February 27, 1953.

[Title of District Court and Cause.]

AMENDMENT TO THIRD-PARTY COMPLAINT

Comes Now, The Hallack and Howard Lumber Company, a corporation, the Third-Party Plaintiff herein, and before any responsive pleading has been filed to its Third-Party Complaint and amends its Third-Party Complaint on file herein by adding thereto a new paragraph to the First Count in said Third-Party Complaint, the same to follow Paragraph IX, said new Paragraph being numbered "X," and on pages numbered 4-a and 4-b; that said amendment is hereto attached.

Dated this 1st day of April, 1953.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant and
Third-Party Plaintiff.

X.

That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.

That on April 25, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho, Southern Division, referred to in the complaint of the Plaintiffs in this action.

That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner

notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

> "This letter is to advise you that the Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack and Howard Lumber Company from any liability whatever in this matter."

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit "F," and by this reference is hereby made a part hereof.

That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

That the said cause of A. M. Powell, Plaintiff, versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951.

EXHIBIT F

[Exhibit F attached is identical to Exhibit F attached to Exhibit A of the Motion to Bring in Third Party Defendant; see page 52 of this printed record.]

Asknowledgment of service attached.

[Endorsed]: Filed April 1, 1953.

[Title of District Court and Cause.]

STIPULATION

It is Stipulated by and between plaintiffs, defendant and third party plaintiff, and third party defendant, that the motions which have heretofore been made by third party defendant shall apply to the third party complaint, as amended.

It is Further Stipulated that the parties may have additional time to file briefs as follows:

Third party plaintiff twenty (20) days from the date hereof, and third party defendant twenty (20) days after receipt of brief from third party plaintiff; plaintiffs twenty days thereafter.

Dated: April 6, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant and
Third-Party Plaintiff.

/s/ CARL P. BURKE,

/s/ CARL A. BURKE,

/s/ LAUREL ELAM,

/s/ FRED TAYLOR,
Attorneys for Third-Party
Defendant.

[Endorsed]: Filed April 7, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—APRIL 8, 1953

Upon stipulation of counsel and the Court being advised, it is ordered that the third party plaintiff have 20 days from this date to file their brief, the third party defendant the 20 days following, to file their brief and the plaintiffs the 20 days thereafter to file their brief.

[Title of District Court and Cause.]

ORDER

This cause is before the Court upon the Third Party Defendant's Motion to Strike, Motion to Dismiss, and Motion for More Definite Statement. This matter having been fully presented to the Court by

numerous briefs presented by respective counsel, and the court having considered the same,

It is the opinion of the Court that the Motion to Dismiss and the Motion to Strike should be denied. It is further the opinion of the Court that there being other ways to obtain the information desired, the Motion for a More Definite Statement should be denied.

Now, Therefore, It Is Hereby Ordered that the Motion to Dismiss, the Motion to Strike, and the Motion for More Definite Statement be and the same hereby are denied.

Dated this 22nd day of July, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed July 22, 1953.

[Title of District Court and Cause.]

ORDER

This Cause is before the Court upon the Third Party Defendant's Motion to Dismiss the Original Complaint and further upon Defendant's Motion to Dismiss the Original Complaint and having been fully presented to the Court by respective counsel and the Court having considered the same;

It is the opinion of the Court that the Motion of the Third Party Defendant to Dismiss the Original Complaint and the Defendant's Motion to Dismiss the Original Complaint should be denied.

Now, Therefore, It Is Hereby Ordered that the said Motions of the Defendant and the Third Party Defendant be and the same hereby are denied.

Dated this 22nd day of July, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed July 24, 1953.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Attorneys of record for the Plaintiffs and the Defendant that the Defendant, The Hallack and Howard Lumber Company, a corporation, may have and take until the 20th day of August, 1953, in which to prepare, serve and file its answer to the complaint of the Plaintiffs on file herein.

Dated this 28th day of July, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,
Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,
Attorney for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed July 29, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT AND THIRD-PARTY PLAINTIFF TO PLAINTIFFS' COMPLAINT

Comes Now, the Defendant, The Hallack and Howard Lumber Company, a corporation, and for answer to Plaintiffs' complaint filed herein denies each and every allegation therein contained not hereinafter expressly admitted or denied.

I.

Answering Paragraph I of said complaint the Defendant admits the allegations therein contained.

II.

Answering Paragraph II of said complaint the Defendant admits the execution and delivery of the Lease, a true copy of which is attached to Plaintiffs' complaint and marked Exhiibt "A," and denies each and every other allegation in said Paragraph II contained.

III.

Answering Paragraph III of said complaint the Defendant admits that on or about September 15, 1949, the aforesaid Lease Agreement was in full force and effect, and admits that on said date a piece of timber, or a slab or splinter broke off one of the logs that were being unloaded and struck one A. M. Powell, a car inspector employed by the Plaintiff, Union Pacific Railroad Company, and injured him. Defendant denies each and every other

allegation contained in said Paragraph III of said complaint.

Further answering the allegations contained in said Paragraph III the Defendant alleges the facts to be that at the time the said A. M. Powell was injured that the said leased premises were in the exclusive charge and control of W. O. Bedal the Third-Party Defendant herein, an Independent contractor, his servants, agents and employees, and that any logs that were unloaded were being unloaded by said Third-Party Defendant as an independent contractor, and that this Defendant had nothing whatsoever to do with the condition of said premises, the construction or maintenance of said log bunker, or the unloading of said logs, or with the reloading of the same on railroad cars, and in no manner whatsoever contributed directly or indirectly to any injury suffered by the said A. M. Powell, and that any injury suffered by the said A. M. Powell was caused by the negligence of the said W. O. Bedal, his servants, agents and employees.

IV.

Answering Paragraph IV of said complaint the Defendant admits that on the 23rd day of October, 1950, A. M. Powell filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the Plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained by him and demanding judgment in the amount of $45,000.00. Defendant

denies each and every other allegation contained in said Paragraph IV of said complaint.

V.

Answering Paragraph V of said complaint the Defendant admits the allegations therein contained.

VI.

Answering Paragraph VI of said complaint the Defendant admits the allegations therein contained.

VII.

Answering Paragraph VII of said complaint the Defendant admits that the Union Pacific Railroad Company, one of the Plaintiffs herein, compromised said judgment by paying to the said A. M. Powell a sum of money, and that said judgment was fully satisfied, but as to the amount of money paid under said compromise settlement this Defendant has not sufficient information or belief to enable it to form an opinion as to the exact amount paid, and therefore, denies that the amount paid by the Union Pacific Railroad Company to the said A. M. Powell was in excess of the sum of $14,094.14.

VIII.

Answering Paragraph VIII of said complaint the Defendant admits that it has not paid the Plaintiffs any part of the damages or expenses incurred by the Plaintiffs in the action of A. M. Powell versus Union Pacific Railroad Company, and Defendant denies each and every other allegation in said Paragraph VIII contained.

IX.

Answering Paragraph IX of said complaint the Defendant denies each and every allegation therein contained.

Further Special and Affirmative Defense

As a further special and affirmative defense the Defendant alleges:

I.

That on September 15, 1949, at the time the said A. M. Powell was injured the leased premises were occupied and used by the said W. O. Bedal, the Third-Party Defendant in this action, and at said time the said W. O. Bedal, his servants, agents and employees, had the exclusive charge and control of the said log loading bunker at Banks, Idaho, and that the said W. O. Bedal had charge of the unloading of the logs from the trucks and the reloading of the same onto railroad cars and that any injuries suffered by the said A. M. Powell on account of the negligence of any person or persons was suffered because of the negligence of the the said W. O. Bedal, all of which is more fully set forth in this Defendant's Third-Party Complaint filed against the said W. O. Bedal, and all of which is hereby by this reference incorporated herein.

Wherefore, Defendant having fully answered, prays to be hence dismissed with just costs and disbursements herein incurred.

/s/ OSCAR W. WORTHWINE,
/s/ J. L. EBERLE,
Attorneys for Defendant and
Third-Party Plaintiff.

Acknowledgment of Service and Certificate of Copy attached.

[Endorsed]: Filed August 19, 1953.

[Title of District Court and Cause.]

ANSWER OF THIRD PARTY DEFENDANT TO PLAINTIFFS' COMPLAINT AND TO THIRD PARTY COMPLAINT

Comes Now the Third-Party Defendant, W. O. Bedal, and for answer to plaintiffs' complaint filed herein, Denies each and every allegation therein contained not hereinafter expressly Admitted or denied.

I.

Answering paragraph I of said complaint the Third-Party Defendant admits the allegations therein contained.

II.

Answering paragraph II of said complaint the Third-Party Defendant admits the execution and delivery of lease, a true copy of which is attached to plaintiffs' complaint and marked Exhibit "A" and Denies each and every other allegation in paragraph II contained.

III.

Answering paragraph III of said complaint the Third-Party defendant admits that on or about September 15th, 1949, the said lease agreement was in full force and effect, and denies each and every other allegation contained in said paragraph III of said complaint.

IV.

Answering paragraph IV of said complaint the said Third-Party defendant Admits that on the 23rd day of October, 1950, A.M. Powell filed an action in the United States District Court for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages claimed to be sustained by him and demanding judgment in the amount of $45,000.00; denies each and every other allegation contained in paragraph IV of said complaint.

V.

Answering paragraph V of said complaint Third-Party Defendant has not sufficient information or belief to enable him to answer said allegations and therefore denies each and every allegation of paragraph V.

VI.

Answering paragraph VI of said complaint, Third-Party Defendant admits the allegations of the first nine lines of said paragraph; that Third-Party Defendant does not have sufficient information or belief to enable him to answer the balance

of said paragraph, and therefore denies the balance of said paragraph VI.

VII.

Answering paragraph VII, Third-Party Defendant does not have sufficient information or belief on which to answer said allegations, and therefore denies all the allegations of said paragraph VII.

VIII.

Answering paragraph VIII of said complaint, Third-Party Defendant does not have sufficient information and belief to enable him to answer the allegations of said paragraph and therefore denies each and every allegation thereof.

IX.

Answering paragraph IX of said complaint, Third-Party Defendant denies each and every allegation therein contained.

Further Special and Affirmative Defenses:

I.

Third-Party Defendant hereby refers to his special and affirmative defenses to the complaint of Third-Party Plaintiff and by this reference incorporates the same as special and affirmative defenses to the complaint.

Comes Now the Third-Party Defendant, W. O. Bedal, and for answer to the complaint of Third-Party Plaintiff filed herein, denies each and every allegation therein contained not hereinafter expressly admitted or denied.

First Count

I.

Answering paragraph I of said Third-Party Complaint, Third-Party Defendant admits the allegations thereof.

II.

Answering paragraph II of said Third-Party Complaint Third-Party Defendant admits the allegations thereof.

III.

In answer to paragraph III of said Third-Party Complaint Third-Party Defendant admits the allegations thereof.

IV.

In answer to paragraph IV of said Third-Party Complaint Third-Party Defendant admits that he was operating under said contract as an independent contractor; denies the other allegations of paragraph IV.

V.

Admits that on or about the 15th day of September, while Third-Party Defendant was unloading logs at Banks, Idaho, under said logging contract, a piece of timber broke off and struck A. M. Powell, an employee of Union Pacific Railroad Company, and admits that said A. M. Powell obtained against Union Pacific Railroad Company a judgment, a copy of which is attached as Exhibit "C" to Third-Party Complaint, and in this connection Third-Party Defendant alleges the fact to be that said accident did not occur by reason of any negligence

whatsoever on the part of said Third-Party Defendant; Third-Party Defendant further alleges that any injuries received by said A. M. Powell resulted from the contributory negligence on the part of A. M. Powell, and that the contributory negligence on the part of A. M. Powell was the proximate cause of said accident and the injuries resulting therefrom, all of which is more particularly set forth in the affirmative defense set forth below.

VI.

Denies the allegations of paragraphs VI, VII and VIII of said Third-Party Complaint.

VII.

Admits the allegations of paragraphs IX and X of said Third-Party Complaint.

Second Count

I.

Third-Party Defendant denies each and every allegation of said second count except such as are specifically admitted herein.

II.

Denies each and every allegation of paragraph II except that Third-Party Defendant admits that at said time the Third-Party Defendant was an independent contractor and was not the servant, agent or employee of Third-Party Plaintiff.

First Further Special and Affirmative Defense to Each Count:

As a further, special and affirmative defense to

each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the judgment obtained against Union Pacific Railroad Company by A. M. Powell is not res judicata as to this Third-Party Defendant; that the issues involved in said suit against the Union Pacific Railroad Company are not the same issues as would have been involved in a suit against this Third-Party Defendant. For one thing, the issues of negligence in the Powell case was the failure of the Railroad Company to furnish Powell a safe place to work. The place furnished him to work was below the spot where Bedal unloaded logs.

It was alleged in the complaint:

> "That the method of unloading logs from the trucks down said incline was hazardous and dangerous to the life and limb of persons near said log bunker, as Defendants knew, or by the exercise of reasonable care, could and should have known."

The unloading was not a negligent act. It was by its nature hazardous and dangerous. The question determined by the jury was whether the Railroad Company in furnishing a place to work down below the hazardous and dangerous operations was negligent.

In the second place, contributory negligence on the part of A. M. Powell was not, and could not

be set up as a defense. The Court instructed the jury as follows:

> "You are instructed that under the terms of the Federal Employers' Liability Act, which is the act under which this action is brought, if you find that the defendant, Union Pacific Railroad, was guilty of any negligence whatsoever as alleged in the complaint and you further find that such negligence proximately contributed to plaintiff's injury, if you find there was any injury, then you are advised that the plaintiff has met the requirement of the law concerning the proof of negligence."

And again:

> "The Employers' Liability Act, heretofore mentioned provides: 'In all actions brought against such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' "

In the third place, the assumption of risk could not be pleaded. The jury was instructed:

> "It is no defense for the defendant, the Union Pacific Railroad Company, to claim that the plaintiff assumed the risks connected with

his employment as a car inspector. In these cases the defense of assumption of risk has been eliminated."

In the fourth place, the defense of the accident being an "unavoidable accident" was not at issue and could not be at issue in that case.

Second Further Special and Affirmative Defense to Each Count:

As a second, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the Union Pacific Railroad Company gave no notice of pendency of action to Third-Party Defendant in connection with said Powell case; that the action against the Railroad Company was brought under the Federal Liability Act; that Third-Party Defendant was not a party to that action, and no request was made by the Union Pacific Railroad Company that Third-Party Defendant be made a party; that even though the attempt had been made to make Bedal a party in that suit it would have been impossible to have tried the issues which must be raised in a suit against Bedal in the same action which involves the Federal Employers' Liability Act. Reference is hereby made to the first affirmative defense and the same incorporated herein as a part of this second affirmative defense.

Third Further Special and Affirmative Defense to Each Count:

As a third, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

The injuries sustained by A. M. Powell were the direct and proximate result of negligence on the part of A. M. Powell; that his own negligence contributed to and was the proximate cause of any injuries sustained by him.

Fourth Further Special and Affirmative Defense to Each Count:

As a fourth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the accident in which said Powell was injured was, so far as this defendant is concerned, an unavoidable accident.

Fifth Further Special and Affirmative Defense to Each Count:

As a fifth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That said A. M. Powell, in connection with his

employment as a car inspector, at the place where he worked and was stationed by his employer, assumed the risks incident to said employment so far as this Third-Party Defendant is concerned.

Sixth Further Special and Affirmative Defense to Each Count:

As a sixth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party defendant alleges:

I.

That there was no indemnity agreement, expressed or implied, whereby Third-Party Defendant indemnifies either Union Pacific Railroad Company or Hallack & Howard; that there was a written contract between Hallack and Howard and Bedal; that although Hallack and Howard already had a lease from the Railroad Company which incorporated a written and specific provision of indemnity, it had no such provision in the contract which it prepared and had Bedal sign; that this contract which was signed is a contract providing for work to be done by an independent contractor.

That if there is any implication from the written contract between Hallack and Howard Lumber Company and Bedal it is that Bedal would be liable only in the event of the negligent operation of the trucks; such implication arising, if at all, by reason of the provision for insurance on the trucks. If this is the foundation for any implication whatso-

ever, such implication would be to the effect there would be no liability on the part of Bedal except when he was negligent in the operation of his trucks.

Seventh Further Special and Affirmative Defense to Each Count:

As a seventh, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third Party Defendant alleges:

I.

That said Powell was not under the employment of Third Party Defendant and was not subject in any way whatsoever to the supervision of the Third-Party Defendant; that the presence of said Powell at any place, at any time, was subject only to the direction and order of his employer, Union Pacific Railroad Company, or his own volition; that the accident was the result of no act of negligence on the part of said Bedal; that any splinter or portion of log which flew through the air was a natural happening and something to be anticipated by any one around a logging operation involving the unloading of logs.

Eighth Further Special and Affirmative Defense to Each Count:

As an eighth, further special and affirmative defense to each of the Counts of Third-Party Complaint, Third-Party Defendant alleges:

I.

That the finding of the jury against Union Pacific Railroad Company and the judgment entered in connection therewith rules out the proposition and claim that Third-Party Defendant had exclusive use and occupancy of the premises where the accident occurred; that the finding of the jury was to the effect and established the fact that Union Pacific Railroad Company was using and occupying the premises; that if there was any negligence on the part of Third-Party Defendant such negligence on his part constituted him a tort feasor along with Union Pacific Railroad Company; that one joint tort feasor has no right of action against the other joint tort feasor.

Wherefore, Third-Party Defendant having fully answered, prays to be hence dismissed with just costs and disbursements herein incurred.

/s/ FRED M. TAYLOR,

/s/ CARL P. BURKE,

/s/ LAUREL E. ELAM,

Attorneys for Third-Party Defendant.

[Endorsed]: Filed August 27, 1953.

[Title of District Court and Cause.]

REQUEST FOR A JURY

Request is hereby made for a jury under the rules of this Court.

Dated: September 1, 1953.

/s/ LAUREL E. ELAM,

/s/ FRED M. TAYLOR,
Attorneys for Third-Party Defendant.

Service of copy acknowledged.

[Endorsed]: Filed September 1, 1953.

[Title of District Court and Cause.]

MOTION TO STRIKE

The plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, move the Court to strike from the Answer of the Third-Party Defendant to plaintiffs' Complaint and the Third-Party Complaint, the following appearing on page 3 of said Answer:

"Further Special and Affirmative Defenses:

"I.

"Third-Party Defendant hereby refers to his special and affirmative defenses to the complaint of Third-Party Plaintiff and by this

reference incorporates the same as special and affirmative defenses to the Complaint."

together with each and every "Further Special and Affirmative Defense thereafter set forth, for the reason that said asserted defenses, or either of them, constitute no defense either in law or fact to plaintiffs' action against the defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and are redundant or immaterial, or both."

That this Motion is made upon the pleadings, records and files in this action.

Dated, September 3rd, 1953.

/s/ BRYAN P. LEVERICH,

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

MOTIONS TO STRIKE FROM ANSWER OF W. O. BEDAL

Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, moves for Orders striking from Third-Party De-

fendant's Answer the following allegations upon the grounds that the same are immaterial, impertinent and do not state a sufficient defense in this action, to wit:

1. Moves to strike the last ten (10) lines of Paragraph V of the First Count of said Answer;

2. Moves to strike all of Paragraph I of the First Further, Special and Affirmative Defense in said Answer;

3. Moves to strike the Second Further, Special and Affirmative Defense in said Answer;

4. Moves to strike the Third Further, Special and Affirmative Defense in said Answer;

5. Moves to strike the Fourth Further, Special and Affirmative Defense in said Answer;

6. Moves to strike the Fifth Further, Special and Affirmative Defense in said Answer;

7. Moves to strike the Sixth Further, Special and Affirmative Defense in said Answer, excepting the words:

> "that there was a written contract between The Hallack and Howard Lumber Company and Bedal."

8. Moves to strike that portion of Paragraph I of the Seventh Further, Special and Affirmative Defense commencing with the word "that" in the sixth line from the top of said Paragraph I to the end of said Paragraph;

9. Moves to strike the Eighth Further, Special and Affirmative Defense in said Answer;

This motion is made upon the records and files

in the above-entitled cause, and each of the above and foregoing paragraphs is a separate motion to strike.

Dated this 12th day of September, 1953.

/s/ OSCAR W. WORTHWINE,
/s/ J. L. EBERLE,
Attorneys for Defendant and Third-Party Plaintiff.

Acknowledgment of Service and Certificate of Copy attached.

[Endorsed]: Filed September 12, 1953.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the Parties hereto that at the trial of the above-entitled cause any Party to this action, in lieu of producing personally the hereinafter named witnesses, may read before the Court and Jury and into the record in this case the testimony of any or all of the following witnesses who testified in the case of "A. M. Powell, Plaintiff, versus Union Pacific Railroad Company, Defendant," Case No. 2776, in the United States District Court for the District of Idaho, Southern Division, to wit:

Harry F. Hansen
Charles Ritter

Albert Parrish
Howard Sage

as contained in the transcript of the proceedings had in said trial prepared and certified to by G. C. Vaughan, the official Court Reporter; the reading of said testimony, however, being subject to any objections for relevancy and materiality.

It Is Further Stipulated That any Party to this action may have any or all of said witnesses present in person and have them testify orally at said trial.

Dated this 15th day of September, 1953.

/s/ L. H. ANDERSON,

/s/ E. H. CASTERLIN,

/s/ E. C. PHOENIX,

/s/ BRYAN P. LEVERICH,
Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,
Attorneys for Defendant and Third-Party Plaintiff.

/s/ LAUREL E. ELAM,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,
Attorneys for Third-Party Defendant.

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—SEPT. 15, 1953

This cause came on regularly this date in open court on the motion to strike of the Union Pacific Railroad Company and the motion to strike of the Defendant and Third-Party Plaintiff, The Hallack & Howard Lumber Company, L. H. Anderson appearing on behalf of the Union Pacific Railroad Company, Oscar Worthwine appearing for the Defendant, The Hallack & Howard Lumber Company, and Carl A. Burke appearing for the Third-Party Defendant.

After hearing respective counsel, the Court granted the motion to strike as it pertains to the Union Pacific Railroad Company, and took under advisement the motion to strike of the Defendant and Third-Party Plaintiff.

[Title of District Court and Cause.]

ORDER OVERRULING MOTION TO STRIKE

The Defendant and Third-Party Plaintiff having filed herein its Motion to Strike from the affirmative defenses set out by the Third-Party Defendant, and the same having come on regularly for hearing on the 15th day of September, 1953, at the hour of 3:30 o'clock p.m., and oral arguments being had and briefs filed, and the Court having come to the conclusion that said Motion to Strike should be overruled and denied, without prejudice,

It Is Hereby Ordered:

That the said Motion to Strike of the Defendant and Third-Party Plaintiff is hereby denied without prejudice.

Dated this 17th day of September, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 17, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—SEPT. 21, 1953

No. 2944-S, Civil

This cause came on for trial before the Court as to Oregon Short Line Railroad Company, et al., Plaintiff, v. The Hallack & Howard Lumber Company, Defendant, and before the Court and jury as to The Hallack & Howard Lumber Company, Third-Party Plaintiff, v. W. O. Bedal, Third-Party Defendant.

L. H. Anderson, Esquire, appeared as counsel for the Oregon Short Line Railroad Company and the Union Pacific Railroad Company; J. L. Eberle, Esquire, and Oscar W. Worthwine, Esquire, appeared for The Hallack and Howard Lumber Company; and Fred Taylor, Esquire, and Laurel Elam, Esquire, appeared for W. O. Bedal.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of

twelve persons, one at a time, written on separate slips of paper, to secure a jury. Blanche W. Mills, Harold H. Martin, and Jere J. Long, whose names were so drawn, were excused for cause; Ruth L. Gilbert, Jess A. Breshears and Nell Aikens, whose names were also drawn, were excused on the Third-Party Plaintiff's peremptory challenge; and Alice Baker and Harold G. Brown, whose names were likewise drawn, were excused on the Third-Party Defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were accepted by the parties to complete the panel of the jury, to wit:

Hassell Blankenship
Hilda McAfee
Margaret Slater
Rosemary Emery
Amy L. Wheeler
Roy C. Boatman
Irene Krebs
Carl Emory
John F. Bruins
Lawrence W. Elliott
Amy H. Clark
Harry A. Chase

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of Stella O. Elmore and Hattie L. Carson were drawn from the jury box, and on being

sworn and examined on voir dire, were found duly qualified, and were accepted by counsel for the respective parties.

After a statement of plaintiffs' case by their counsel, Earl W. Bruett and George Hubbard were sworn and examined as witnesses on the part of the plaintiffs.

After admonishing the jury, the Court excused them to 10 o'clock a.m., on Tuesday, September 22, 1953, and further trial of the cause was continued to that time.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause as between the plaintiffs herein and The Hallack and Howard Lumber Company, a corporation, defendant, came on regularly for trial before the Court, and the Court having duly considered the evidence and being fully advised in the premises, now finds the following:

Findings of Fact

I.

That the plaintiffs, and each of them, are corporations organized and existing under the laws of the State of Utah; the defendant, The Hallack and Howard Lumber Company, is a corporation organized and existing under the laws of the State of

Colorado. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That on the 3rd day of March, 1944, the plaintiffs herein as lessor entered into a lease agreement with the defendant, The Hallack and Howard Lumber Company, as lessee, whereby a portion of the lessor's premises at Banks, Boise County, Idaho, was leased to the said Lumber Company for a log loading site, a true copy of which lease is attached to plaintiffs' complaint marked Exhibit "A" and admitted in evidence. That said lease, among other things, provides:

> "that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damages or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

III.

That on the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect, and that at Banks, Idaho, on said date, while the defendant, its agents, servants or employees were unloading logs on or onto said leased premises

and using and occupying said premises in accordance with the terms and conditions of said lease a piece of timber broke off one of the logs being unloaded from a truck and struck one, A. M. Powell, a car inspector employed by the Union Pacific Railroad Company, seriously injuring the said A. M. Powell.

IV.

That as a result of said accident and injuries sustained, A. M. Powell, on the 3rd day of October, 1950, filed an action in the United States District Court, for the District of Idaho, Southern Division, against one of the plaintiffs herein, Union Pacific Railroad Company, for injuries and damages sustained, demanding judgment in the sum of $45,000.00.

V.

That thereupon the plaintiff, Union Pacific Railroad Company, gave notice to the defendant herein of the pendency and nature of said action, calling its attention to the lease and its provisions hereinbefore referred to, and tendered to said defendant the defense of said action, requesting that said defense be undertaken by it, with notice that the plaintiff Union Pacific Railroad Company expected to be fully reimbursed for any judgment that might be recovered against it by the said Powell, together with all expenses incurred in the event said defendant did not take over said defense and assume all liability, but that said defendant refused and neglected to do so.

VI.

That the plaintiff, Union Pacific Railroad Company, conducted said defense in said action in good faith and with due diligence before the court and jury, commencing the 26th day of February, 1951, and on the 2nd day of March, 1951, the jury returned a verdict in favor of said Plaintiff A. M. Powell, and against the said Union Pacific Railroad Company in the sum of $15,000.00. Judgment on the verdict, including costs in the amount of $92.26, with interest at 6% per annum, was entered, and on September 18, 1951, Motion for Judgment Notwithstanding the Verdict was by the court denied, and which judgment the defendant herein had notice but it failed, refused and neglected to take any part in any or all of the further proceedings had in connection with said action.

VII.

That thereafter, to wit, on the 15th day of December, 1951, the said Union Pacific Railroad Company compromised said judgment by paying to the said plaintiff A. M. Powell the total sum of $14,500.00, and said judgment was fully satisfied.

VIII.

That the slab which struck the said plaintiff A. M. Powell came from a log being unloaded from a truck on a road some twenty feet above the location of the bunker where the logs were loaded on the train and a "Cat" and boom was used, a line placed underneath the logs and they were pushed

off the truck and would fall down a steep incline unrestrained a distance of about twenty feet where they were pushed from the truck. The incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the bunker. The slab that caused the injury to the said plaintiff A. M. Powell broke off one of those logs and was thrown through the air and was caused to break from the log because of the force of the drop.

IX.

That the logs in question were being unloaded by one W. O. Bedal, his agents, servants or employees, who were using the premises covered by the lease hereinbefore referred to and were performing the work of hauling, unloading and the loading of logs onto plaintiffs' car for shipment by the Hallack and Howard Lumber Company and for the use and benefit of The Hallack and Howard Lumber Company under an arrangement whereby the said Bedal performed said unloading and loading of said cars for and on behalf of said Lumber Company in place of said Lumber Company performing said work itself.

X.

That the defendant The Hallack and Howard Lumber Company was the owner of the logs being unloaded at the time and place the said A. M. Powell was injured and paid the said Bedal for the hauling, unloading and loading of logs on the

premises leased by the plaintiffs to the defendant The Hallack and Howard Lumber Company.

XI.

That the plaintiffs or either of them had no duties to perform in connection with either the unloading or the loading of logs at Banks, Idaho, and at the time and place Powell was injured were performing no part of the work of unloading or of loading the said logs. That the unloading of the logs onto said leased premises and the loading of said logs from said leased premises onto the cars of the plaintiffs were performed solely and entirely by the defendant The Hallack and Howard Lumber Company by and through its agent, the said W. O. Bedal. That the said Union Pacific Railroad Company was held liable for the injuries sustained by the said A. M. Powell only because it had not furnished Powell a safe place within which to perform his work, a duty which was nondelegable as between the Union Pacific Railroad Company and the said Powell. That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, its agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's injuries was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner

and under the circumstances hereinbefore referred to.

XII.

The the plaintiff Union Pacific Railroad Company has sustained damages for the settlement made by it in satisfaction of the judgment in the said case of A. M. Powell vs. Union Pacific Railroad Company in the amount of $14,500.00, costs and expenses of litigation in the amount of $1,076.98, together with reasonable attorney's fees in the amount of $1,000.00.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That the accident and resulting injuries to the said Powell arose out of the use and occupation of said leased premises and the unloading of the logs thereon by The Hallack and Howard Lumber Company, its agents, servants, or employees, who had possession of said premises and was performing the work of unloading of said logs thereon for the purpose of loading dogs from said premises onto cars for shipment by the defendant The Hallack and Howard Lumber Company, and that under the provisions of said lease agreement, or independent of said lease, it became, was, and is the duty of the defendant The Hallack and Howard Lumber Company, to assume and pay for all injuries and damages sustained by the said A. M. Powell and to indemnify the plaintiff, the Union Pacific Railroad

Company, against, and save it harmless from, all liability for such injuries, damages or loss.

II.

That the Union Pacific Railroad Company is entitled to have and recover from the defendant, The Hallack and Howard Lumber Company, the sum of $14,500.00; costs and expenses of litigation in the amount of $1,076.98; reasonable attorney's fees in the amount of $1,000.00; with interest on said amounts at the rate of six per cent (6%) per annum from the 15th day of December, 1951, to the date of judgment entered herein.

Let Judgment be entered accordingly.

Dated this 22nd day of September, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 22, 1953.

[Title of District Court and Cause.]

OBJECTIONS BY DEFENDANT AND THIRD-PARTY PLAINTIFF, THE HALLACK AND HOWARD LUMBER COMPANY, TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE PLAINTIFF RAILROAD COMPANIES

I.

Defendant and Thirty-Party Plaintiff objects to proposed Finding of Fact No. III in that it refers

to the Defendant's agents, servants and employees unloading the logs, and the record shows without contradiction, that the only person engaged in unloading logs was the said W. O. Bedal, Third-Party Defendant, as an independent contractor.

II.

Defendant and Third-Party Plaintiff objects to proposed Finding of Fact No. VIII upon the ground that the logs falling down the incline would go a distance of about twenty feet, and instead would go a distance of about forty-seven feet.

III.

Defendant and Third-Party Plaintiff objects to proposed Finding of Fact No. XI upon the following grounds:

a. That the loading and unloading was done by The Hallack and Howard Lumber Company, or by or through its agents, the record showing conclusively that the entire operation complained of was done by W. O. Bedal as an independent contractor;

b. That the unsafe place alleged was not created by the fault of The Hallack and Howard Lumber Company, its agents, servants or employees, but by the active and primary negligence of W. O. Bedal;

c. That the said W. O. Bedal was not the agent of The Hallack and Howard Lumber Company, but was an independent contractor.

IV.

Defendant and Third-Party Plaintiff objects to

Conclusion of Law No. 1 upon the ground that the use of the premises by The Hallack and Howard Lumber Company was not through its agents, servants or employees, but only through W. O. Bedal as an independent contractor.

V.

Defendant and Third-Party Plaintiff objects to the proposed Findings of Fact and Conclusions of Law upon the ground that in the event the Court holds and finds that there was any act of negligence, other than the primary and active negligence of W. O. Bedal, the judgment in favor of the Plaintiffs cannot be sustained under the terms and provisions of the Lease Agreement because such terms and provisions do not indemnify said Plaintiffs against their own negligence.

Dated this 22nd day of September, 1953.

/s OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for The Hallack and Howard Lumber Company, Defendant and Third-Party Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed September 22, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—SEPTEMBER 22, 1953

This cause came on for further trial before the Court as to Oregon Short Line Railroad Company, et al., Plaintiffs, vs. The Hallack and Howard Lumber Company, Defendant, and before the Court and jury as to The Hallack and Howard Lumber Company, Third-Party Plaintiff, vs. W. O. Bedal, Third-Party Defendant.

L. H. Anderson read portions of the transcript of the record in case No. 2776, and here the plaintiffs rest; and here defendant The Hallack and Howard Lumber Company rests.

The Court found that the Union Pacific Railroad Company is entitled to recover from The Hallack and Howard Lumber Company, and counsel for the Union Pacific Railroad Company was ordered to prepare Findings of Fact and Conclusions of Law and Judgment.

J. L. Eberle made an opening statement for the Third-Party Plaintiff The Hallack and Howard Lumber Company and U. R. Armstrong was sworn and examined as a witness on the part of the Third-Party Plaintiff; and here the Third-Party Plaintiff rests.

The Third-Party Plaintiff having rested, comes now the Third-Party Defendant and moves the Court for an order dismissing the Complaint of the Third-Party Plaintiff, which motion was overruled without prejudice. Here the Third-Party Defendant rests and all parties close.

Comes now the Defendant and Third-Party Plaintiff and moves the Court for a directed verdict in favor of the Defendant and Third-Party Plaintiff and against the Third-Party Defendant. Said motion was taken under advisement by the Court.

After admonishing the jury, the Court excused them to 10 o'clock a.m. on Wednesday, September 23, 1953, and further trial of the cause was continued to that time.

United States District Court for the District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

JUDGMENT

The cause of the plaintiffs herein against the defendant, The Hallack and Howard Lumber Com-

pany, having come on regularly for trial before the court without a jury, and testimony and evidence having been offered by the respective parties, and the court having filed its Findings of Fact and Conclusions of Law and Order for Judgment, Now, Pursuant thereto, It Is Hereby:

Ordered and Adjudged that the plaintiff, Union Pacific Railroad Company, do have and recover of and from the defendant, The Hallack and Howard Lumber Company, the sum of $16,576.98, with interest thereon from the 15th day of December, 1951, to the date of this judgment amounting to $1,757.17, making a total judgment of $18,334.15, together with its costs and disbursements in this action to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of the Court in the sum of $.....

Dated, this 22nd day of September, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 22, 1953.

[Title of District Court and Cause.]

ORDER STAYING EXECUTION

A judgment having been heretofore entered in the above-entitled cause in favor of the Plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, in the sum of $18,334.15

against the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and a judgment having been entered in the above-entitled cause in favor of the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, in the sum of $18,334.15 against the Third-Party Defendant, W. O. Bedal, and good cause therefore being shown,

It Is Hereby Ordered:

That any and all executions on the judgment in favor of the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, and against the Third-Party Defendant, W. O. Bedal, be, and hereby are, stayed until the said judgment of the Plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and against the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, is satisfied and discharged.

Dated this 23rd day of September, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 23, 1953.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the Third-Party Plaintiff, The Hallack and Howard

Lumber Company, a Corporation, and against the Third-party Defendant, W. O. Bedal, and assess damages against said Third-Party Defendant in the sum of $18,334.15.

/s/ H. A. CHASE,
Foreman.

[Endorsed]: Filed September 23, 1953.

[Title of District Court and Cause.]

MINUTE ORDER—SEPTEMBER 23, 1953

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

At this time the Court granted the motion of the Third-Party Plaintiff for a directed verdict and appointed Harry A. Chase foreman of the jury, who signed the verdict, which was in the words following:

"(Title of Court and Cause.)

"Verdict

"We, the jury in the above-entitled cause find for the Third-Party Plaintiff, The Hallack and Howard Lumber Company, a Corporation, and against the Third-Party Defendant, W. O. Bedal,

and assess damages against said Third-Party Defendant in the sum of $18,334.15.

"H. A. CHASE,
"Foreman."

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

In the District Court of the United States for the District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

JUDGMENT

The cause of the Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation,

against the Third-Party Defendant, W. O. Bedal, having come on for trial before the Court and a jury, both parties appearing by counsel, and the issues having been duly tried, and the Court on motion of the Third-Party Plaintiff directed the jury to render a verdict for Third-Party Plaintiff and against Third-Party Defendant in the sum of $18,334.15, and the jury having done so,

It Is Hereby Ordered, Adjudged and Decreed That the Third Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, recover of Third-Party Defendant, W. O. Bedal, the sum of $18,334.15, and its costs of action.

Dated this 23rd day of September, 1953.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: Filed September 23, 1953.

[Title of District Court and Cause.]

NOTICE OF TAXATION OF COSTS

To: Messrs. Elam and Burke, and Fred M. Taylor, Attorneys for Third-Party Defendant.

Please Take Notice that the attached Bill of Costs will be presented to the Clerk of the above-entitled Court for taxing at his office in the Federal Building

in Boise, Ada County, Idaho, on the 29th day of September, 1953, at 10:00 o'clock a.m., or as soon thereafter as the matter may be heard.

Dated this 23rd day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and Third-Party Plaintiff.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

Marshal's fee for service of Summons and Third-Party Complaint upon W. O. Bedal, Third-Party Defendant.....	$12.20
Witness fees for U. R. Armstrong as follows:	
Two days attendance at $4.00 per day.....	8.00
Four days subsistence at $5.00 per day.....	20.00
Mileage from Winchester, Idaho, to Boise, and return, 460 miles at 7c per mile.....	32.20
Total Disbursements	$72.40

Costs taxed this 26th day of Sept., 1953, in the amount of $12.20.

/s/ ED M. BRYAN,
Clerk.

Duly verified.

Service of copy acknowledged.

[Endorsed]: Filed September 23, 1953.

[Title of District Court and Cause.]

NOTICE

To: Oscar W. Worthwine, Boise, Idaho, Attorney for Defendant; Laurel E. Elam, Boise, Idaho, Attorney for Third-Party Defendant.

Please Take Notice, that the Bill of Costs, a copy of which is hereto attached, will be presented to the Clerk of the above-entitled Court for taxation, at his office in the Federal Building, in the City of Boise, Idaho, on the 1st day of October, 1953, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated, September 24, 1953.

/s/ L. H. ANDERSON,
Of Counsel for Plaintiffs.

Affidavit of service by mail attached.

[Title ofDistrict Court and Cause.]

PLAINTIFF'S MEMORANDUM OF COSTS AND DISBURSEMENTS

Clerk's Fees:

Filing Complaint		$15.00
Certifying papers from file in case Powell vs. UPRR Co.		2.30

Service Fees:

Marshal's Fee—Service of Summons		2.00
Marshal's Fee—Service of subpoena on George Hibbard		10.10
Attorneys Docket Fee		20.00

Witnesses:

Earl W. Bruett, Nampa, Idaho, mileage, 20 miles each way @ 7c, $2.80		
1 day attendance	4.00	6.80
George Hibbard, Banks, Idaho, mileage, 43 miles each way @ 7c, $6.02		
1 day attendance	4.00	10.02
Total		$66.22

Costs taxed this 26th day of Sept., 1953, in the amount of $66.22.

/s/ ED M. BRYAN,
Clerk.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS

Comes Now, the Defendant and Third-Party Plaintiff, The Hallack and Howard Lumber Company, a corporation, and having made timely objection to the Findings of Fact proposed by the Plaintiffs herein, moves the Court to amend the same in the following particulars:

I.

That in line 3 of paragraph III the words "its" be stricken, and in lieu thereof, the following words be inserted:

"By and through W. O. Bedal, an independent contractor, his"

II.

That in line 9 of paragraph XI the word "agent" be stricken, and in lieu thereof, the following words be inserted:

"independent contractor."

III.

That in line 7, from the end of paragraph XI, the word "its" be stricken, and in lieu thereof, the following words be inserted:

"by and through W. O. Bedal, his"

Dated this 23rd day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,

Attorneys for Defendant and Third-Party Plaintiff.

ORDER

For good cause shown, It Is Hereby Ordered That the above and foregoing Motion be, and hereby is, granted, and said Findings of Fact be, and hereby are, amended accordingly.

Dated this 25th day of September, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed September 25, 1953.

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT

Comes Now the Third-Party Defendant, W. O. Bedal, and objects to the Findings of Fact submitted by the plaintiffs herein, and moves the Court to amend the same in the following particulars:

I.

That the following portion of paragraph XI be stricken, to wit:

"That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's

injuries was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to."

II.

That there be stricken from Paragraph I of the Conclusions of Law, in lines 8 and 9 thereof, the following:

"or independent of said lease."

Dated this 2nd day of October, 1953.

/s/ LAUREL E. ELAM,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

Affidavit of service and certificate of service attached.

[Endorsed]: Filed October 2, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. O. Bedal, Third-Party Defendant in the above action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on behalf of the Hallack and Howard Lum-

ber Company, on September 23, 1953, and from that Order of the United States District Court, granting said defendant and Third-Party Plaintiff's Motion for a directed Verdict, said Order being made on September 23, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,

Atorneys for Third-Party Defendant.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the State of Idaho, as surety, are held and firmly bound unto The Hallack and Howard Lumber Company, a corporation, in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to said The Hallack and Howard Lumber Company, its successors and assigns, to which payment well and

truly to be made, we bind ourselves, our successors, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 23rd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company, and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a judgment was rendered against said W. O. Bedal in favor of said The Hallack and Howard Lumber Company, and the said W. O. Bedal having filed herewith a notice of appeal to reverse said judgment to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now the condition of this obligation is to secure the payment of costs if said appeal is dismissed, or the judgment affirmed, and for the payment of such costs as the Appellate Court may award if the judgment is modified, and upon payment thereof this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,
Attorney-in-fact,
Surety.

Countersigned:

By /s/ FRANK W. KERNS,
Resident Agent for Fidelity and Deposit Company of Maryland, a Corporation.

Acknowledged before me the day and year first above written.

/s/ ALICE GOSSI.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. O. Bedal, Third-Party Defendant in the above action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in favor of the plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, dated September 22, 1953, and from the Findings of

Fact and Conclusions of Law filed in support of said Judgment and signed by the United States District Court Judge, Chase A. Clark, under date of September 22, 1953.

Dated this 17th day of October, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ CARL P. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the State of Idaho, as surety, are held and firmly bound unto Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, said plaintiffs, in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to said plantiffs, their successors and assigns, to

which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 22nd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a judgment was rendered against said The Hallack and Howard Lumber Company in favor of said plaintiffs, and the said W. O. Bedal having filed herewith a notice of appeal to reverse said judgment, and to the Findings of Fact and Conclusions of Law to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of this obligation is to secure the payments of costs if said appeal is dismissed, or the judgment and Findings of Fact and Conclusions of Law affirmed, and for the payment of such costs as the Appelate Court may award if the judgment, Findings of Fact and Conclusions of Law are modified, and upon payment thereof this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any

papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,
Attorney-in-fact,
Surety.

Countersigned:

By /s/ FRANK W. KERNS,
Resident Agent for Fidelity and Deposit Company of Maryland, a Corporation.

Acknowledged before me the day and year first above written.

/s/ ALICE GOSSI.

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we, W. O. Bedal, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact a surety business in the

State of Idaho, as surety, are held and firmly bound unto The Hallack and Howard Lumber Company, a corporation, in the full and just sum of Twenty Thousand ($20,000.00) Dollars to be paid to said The Hallack and Howard Lumber Company, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of October, 1953.

Whereas, on the 23rd day of September, 1953, in an action pending in the United States District Court for the District of Idaho, Southern Division, wherein Oregon Short Line Railroad Company, and Union Pacific Railroad Company were plaintiffs, The Hallack and Howard Lumber Company was defendant and third-party plaintiff, and W. O. Bedal was third-party defendant, a Judgment was rendered against said W. O. Bedal in favor of said The Hallack and Howard Lumber Company, and the said W. O. Bedal having filed a notice of appeal to reverse said judgment to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now the condition of this obligation is such that if the said W. O. Bedal shall prosecute his appeal to effect and shall satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full said modification of the judgment and such costs, inter-

est and damages as the Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

The said Surety hereby irrevocably appoints the Clerk of this Court as its Agent upon whom any papers affecting its liability on this undertaking may be served.

Signed, sealed and delivered this 20th day of October, 1953.

/s/ W. O. BEDAL,
Principal.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ RUBY GALLAHER,
Attorney-in-fact,
Surety.

Countersigned:

By /s/ FRANK W. KERNS,
Resident Agent for Fidelity and Deposit Company of Maryland, a Corporation.

Acknowledged before me the day and year first above written.

/s/ ALICE GOSSI.

The form of the foregoing Bond and the sufficiency of the Surety are hereby approved.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed October 22, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Ordered that the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to January 18, 1954.

Dated this 25th day of November, 1953.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed November 25, 1953.

In the United States District Court for the District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

TRANSCRIPT OF PROCEEDINGS

This matter came on for hearing before the Honorable Chase A. Clark, United States District Judge, without a jury, as to the Plaintiff vs. Hallack and Howard, Defendant, and also came on for hearing before the Honorable Chase A. Clark, sitting with a jury as to Hallack & Howard Lumber Company vs. W. O. Bedal, third-party defendant, on September 21, 1953, at Boise, Idaho.

L. H. ANDERSON, ESQ.,
E. H. CASTERLIN, ESQ.,
Attorneys for the Plaintiff.

OSCAR W. WORTHWINE, ESQ.,
J. L. EBERLE, ESQ.,
Attorneys for Defendant, and Third-Party Plaintiff, Hallack & Howard Lumber Company.

FRED M. TAYLOR, ESQ.,
LAUREL E. ELAM, ESQ.,
CARL A. BURKE, ESQ.,
CARL P. BURKE, ESQ.,
Attorneys for Third-Party Defendant, W. O. Bedal.

September 21, 1953—10 A.M.

The Court: It is understood that the case of Union Pacific Company vs. Hallack & Howard Lumber Company will be tried before the Court and the case of Hallack & Howard Lumber Company vs. W. O. Bedal will be tried before the jury. It has been agreed by counsel.

(Selection of jury.)

Mr. Eberle: It was also understood this morning that testimony offered before the Court would also be offered as and would be the testimony on the balance or other portion of the case.

The Court: Yes.

Mr. Eberle: If any written evidence is offered and read, it may be understood that any of the counsel may read any portion that was not read by the attorney offering the same.

The Court: That may be understood, wherever

testimony of the former hearing is offered in which the jury is interested, and that would apply where the Court is concerned, it should be treated the same as a deposition and the questions and answers placed in the record in that way. Now you may proceed with your opening statement, Mr. Anderson.

(Statement by Mr. Anderson.)

(Statement by Mr. Elam.) [5*]

The Court: You may proceed Mr. Anderson.

Mr. Anderson: For the convenience of the Court I am having marked, a photostatic copy of the lease attached to our complaint, it is admitted but I thought for the convenience of the Court we better have one available rather than turn to the pleadings, it is marked "exhibit A" and attached to the complaint. I don't know whether it will be given another number now or not.

The Court: Yes, it will be marked Plaintiff's number 1.

Mr. Anderson: We offer it at this time.

The Court: It may be admitted.

Mr. Anderson: I now offer in evidence, Plaintiffs' exhibit 2 which is a certified copy of certain papers and pleadings in the case of A. M. Powell vs. Union Pacific Railroad Company, consisting of the complaint of Powell, the answer of the Union Pacific, the verdict of the jury and the Judgment of the Court and the Union Pacific's motion for judgment notwithstanding the verdict, the Order

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

of the Court overruling our motion for judgment notwithstanding the verdict, motion for supersedeas, order granting supersedeas, notice of appeal, supersedeas and cost bond, designation of the record on appeal, reporter's transcript, notice to appellee of the appeal and the filing of bond, order extending time for filing record on appeal, satisfaction of judgment and notice to dismiss appeal. I offer these in evidence as plaintiffs' exhibit 2.

The Court: Any objection?

Mr. Elam: We object to anything beyond the judgment, there is no relevancy for anything beyond the judgment, in fact there was no appeal, this matter was all set forth in the pleadings and not denied.

The Court: The objection is overruled and the the exhibit may be admitted.

PLAINTIFF'S EXHIBIT No. 2

In the United States District Court for the District of Idaho, Southern Division

No. 2776

A. M. POWELL,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

COMPLAINT

Comes Now the plaintiff in the above-entitled action, and for a cause of action against the above-named defendant complains and alleges as follows:

I.

This action arises under the Act of April 22, 1908, Chap. 149, 33 Stat. 65, 66, as amended; U.S.C., Title 45, Secs. 51-60, inclusive, as amended, as hereinafter more fully appears.

II.

During all the times herein mentioned, defendant was a corporation organized and existing under the laws of the State of Utah, and owned and operated in interstate commerce a railroad passing through Boise County, State of Idaho.

III.

During all the times herein mentioned, there was

Plaintiff's Exhibit No. 2—(Continued)

located on the property of defendant, near Banks, Boise County, State of Idaho, a log bunker close to the tracks of said defendant's railroad for the purpose of stopping logs rolled down an incline to the tracks of defendant's railroad so that they could be loaded on defendant's railroad cars.

IV.

That defendant negligently permitted said log bunker to become filled with bark, limbs, dirt, and other debris, so that it would not properly stop logs rolled down said incline, all of which defendant well knew, or by the exercise of reasonable care could and should have known.

That the method of unloading logs from the trucks down said incline was hazardous and dangerous to the life and limb of persons near said log bunker, as defendants knew, or by the exercise of reasonable care, could and should have known.

V.

That on or about September 15, 1949, plaintiff was employed by defendant as a car inspector and repairman, and, as such employee, part of plaintiff's duties were in the furtherance of interstate commerce, or directly or closely and substantially affected interstate commerce.

VI.

That on or about September 15, 1949, defendant negligently ordered, directed and instructed plain-

Plaintiff's Exhibit No. 2—(Continued)

tiff to inspect defendant's railroad cars located on defendant's track beside said log bunker, and while so working, pursuant to defendant's orders, by reason of defendant's negligence in thus putting him to work near said log bunker, plaintiff was struck and crushed by a piece of log going over or along said log bunker, and the plaintiff was thereby knocked off of the said bunker.

VII.

That by reason of defendant's negligence, as aforesaid, the plaintiff suffered a fractured rib and hip bone, broken process on his fourth and fifth lumbar, other serious injuries to his back, and head, and serious injuries to his bowels, intestines, and liver, and other internal injuries.

VIII.

Prior to these injuries plaintiff was a strong, able-bodied man, capable of earning, and actually earning, approximately $290.00 per month; that by these injuries he has been made incapable of any gainful activity, and has suffered great physical and mental pain.

Wherefore, plaintiff demands judgment against defendant in the sum of $45,000.00, and costs.

W. H. LANGROISE,

W. E. SULLIVAN,

Attorneys for Plaintiff.

Plaintiff's Exhibit No. 2—(Continued)

State of Idaho,
County of Ada—ss.

A. M. Powell, being first duly sworn, deposes and says:

That he resided at Boise, Idaho; that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same are true of his own knowlege, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

A. M. POWELL.

Subscribed and sworn to before me this 27th day of September, 1950.

[Seal] GLORIAN LEDVINA,
Notary Public for Idaho.

DEMAND FOR TRIAL BY JURY

Please Take Notice, that plaintiff demands trial by jury in this action.

W. H. LANGROISE,

W. E. SULLIVAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 13, 1950.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

ANSWER

Comes now the defendant, Union Pacific Railroad Company, and for answer to plaintiff's complaint filed herein denies each and every allegation therein contained not hereinafter expressly admitted or denied.

I.

Defendant denies each and every allegation contained in paragraphs I, VI, VII and VIII of said complaint.

II.

Answering paragraph II of said complaint, defendant admits that during the times mentioned in the complaint it was a corporation organized and existing under and by virtue of the laws of the State of Utah and operated a railroad passing through Boise County, State of Idaho.

III.

Answering paragraph III, defendant admits that there was located a log bunker adjacent to the tracks at Banks, Boise County, Idaho, which was used for the purpose of loading logs onto railroad cars.

IV.

Defendant denies each and every allegation contained in paragraph IV of said complaint, and alleges that whatever negligence, if any there was,

Plaintiff's Exhibit No. 2—(Continued)

with reference to said log bunker becoming filled with bark, limbs, dirt and other debris, resulted from the acts and conduct of the agents, servants, and employees of The Hallack & Howard Lumber Co., and which constituted the sole proximate cause of any injuries the plaintiff sustained.

V.

Answering paragraph V of said complaint, defendant admits that on or about September 15, 1949, plaintiff was employed as a car inspector. Defendant denies each and every other allegation therein contained.

VI.

Further answering said complaint, defendant alleges that whatever injuries plaintiff sustained were directly contributed to and proximately caused by the carelessness and negligence of the plaintiff.

Wherefore, defendant having fully answered, prays to be hence dismissed with its just costs and disbursements herein incurred.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant, Union Pacific Railroad Company.

Plaintiff's Exhibit No. 2—(Continued)

Residence & P.O. Address, Attorneys for Defendant:

BRYAN P. LEVERICH,
10 South Main Street,
Salt Lake City, Utah.

L. H. ANDERSON,
E. H. CASTERLIN,
P.O. Box 530,
Pocatello, Idaho.

I certify that on October 23rd, 1950, I deposited in the United States Post Office at Pocatello, Idaho, a full, true, and correct copy of the foregoing Answer, enclosed in a sealed envelope, postage prepaid, directed to Messrs. W. H. Langroise and W. E. Sullivan, Attorneys at Law, McCarty Building, Boise, Idaho, that being their last known address.

L. H. ANDERSON,
Of Counsel for Defendant.

[Endorsed]: Filed October 24, 1950.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

VERDICT

We, the jury in the above-entitled cause, find for the plaintiff, and against the defendant, and

Plaintiff's Exhibit No. 2—(Continued)

assess damages against the defendant in the sum of $15,000.00

GEORGE L. YOST,
Foreman.

[Endorsed]: Filed March 2, 1951.

United States District Court for the District of Idaho, Southern Division

No. 2776

A. M. POWELL,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

JUDGMENT

This cause came on for trial before the Court and a jury on February 26, 1951, et seq., both parties appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiff in the sum of $15,000.00,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff recover of defendant the sum of $15,000.00 with interest at the rate of 6% per annum, and his costs of action, and that the plaintiff have execution therefor.

Plaintiff's Exhibit No. 2—(Continued)

Dated at Boise, Idaho, this 2nd day of March, 1951.

[Seal] ED. M. BRYAN,
Clerk, U. S. District Court.

[Endorsed]: Filed March 2, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Comes now the defendant, it having heretofore at the close of all of the testimony at the trial hereof, moved the Court for a directed verdict in its favor, which Motion was denied, and thereafter a verdict having been returned by the jury in favor of the plaintiff and against the defendant, and moves that the judgment in favor of the plaintiff on the verdict be set aside and that judgment be entered herein in favor of the defendant notwithstanding the verdict, on the following grounds, to wit:

I.

That the evidence is wholly insufficient to warrant a recovery by the plaintiff, and upon the facts and the law the plaintiff established no right to relief.

Plaintiff's Exhibit No. 2—(Continued)

II.

That the evidence wholly fails to establish any negligence on the part of the defendant, or any negligence, either in whole or in part, which was the proximate cause of plaintiff's injuries; plaintiff's evidence fails to establish that the slab of wood which struck the plaintiff resulted from any negligence on the part of the defendant; that the plaintiff did not see the slab in flight until it was 3 or 4 feet from him, and plaintiff's only other witness did not see the slab and knew nothing about it until someone hollered "look out," so that no reasonable inference can be drawn from the evidence that the slab broke off as a result of any negligence on the part of the defendant, whereas defendant's witnesses established by uncontradicted evidence that said slab broke off a log before said log reached the landing or the bunker.

III.

That plaintiff's evidence with reference to negligence was wholly conjectural and speculative and did not amount to even a scintilla, and there is no evidence that if said log bunker had been free from all substances the accident would not have occurred.

IV.

The evidence is undisputed that at the time said slab broke off the log, the unloading of said logs from the truck was the normal operation, the same operation that had been followed for many years

Plaintiff's Exhibit No. 2—(Continued)

and without mishap; that said slab undoubtedly broke off as a direct result of said log having been split while being felled or cut in the forest, but for which the accident would not have occurred.

V.

The evidence is undisputed that the premises were reasonably safe for the type of operation being conducted and for the type and nature of plaintiff's employment; that the slab breaking off a log and flying in the manner it did was unforeseeable by any reasonably prudent person, for the plaintiff himself, knowing all of the facts and circumstances incident to the unloading of logs, stationed himself at what he thought was a safe distance. If he could not foresee such an unusual occurrence then the defendant should not be held to have been able to foresee it. The injuries to the plaintiff resulted from a mere accident. There is no evidence that plaintiff's injuries were the natural and probable consequences of any negligence or wrongful act on the part of the defendant, or that it ought to have been foreseen in the light of the attending circumstances, or that any negligence of the defendant was a link in an unbroken chain of reasonably foreseeable events.

VI.

The undisputed evidence shows that the accident was caused solely by the acts and conduct of Bedal and Smith or The Howard and Hallack Lumber

Plaintiff's Exhibit No. 2—(Continued)

Company, or both of them combined, who were performing the operations of unloading and loading the logs and whose duty it was to keep the bunker and immediate premises free of any and all bark or debris.

VII.

The evidence establishes that plaintiff was guilty of negligence which solely resulted in his injuries; the evidence is undisputed that the plaintiff was sitting on the bunker log facing West and was not watching the logs as they were being unloaded; that plaintiff had established himself approximately 60 feet north of where said logs were being unloaded to the tracks, knowing that at times bark or other substance flew off the logs as they were being unloaded, and had he exercised reasonable care and watched the unloading of said logs he could and would have seen the piece of slab break off the log and could have gotten out of harm's way, as did the other persons situated as he was; or if there was foreseeable danger he should have moved farther than 60 feet away.

VIII.

The court erred in refusing to give to the jury defendant's Requested Instruction No. 1, for the reasons herein set forth and for the reasons set forth in the defendant's Motion for a Directed Verdict.

This Motion will be based upon the records and

Plaintiff's Exhibit No. 2—(Continued)

files herein and the evidence and proof adduced at the trial of said cause, and the minutes of said court.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for the Defendant.

I certify that on March 8th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true, and correct copy of the foregoing Motion for Judgment Notwithstanding the Verdict, enclosed in a sealed envelope, postage prepaid, directed to—

Messrs. W. H. Langroise, and
W. E. Sullivan,
Attorneys at Law,
McCarty Building,
Boise, Idaho.

that being their last known address.

L. H. ANDERSON,
Of Counsel for Defendant.

[Endorsed]: Filed March 9, 1951.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

ORDER

Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A "Cat" and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.

Whether the operation in driving the trucks to

Plaintiff's Exhibit No. 2—(Continued)

the top of this steep embankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable. (Ellis v. Union Pacific Railroad Company, 329 U. S. 649.)

The motion will be denied, and it is so Ordered.

Dated September 18, 1951.

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed September 18, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

MOTION FOR SUPERSEDEAS

Defendant moves the Court to stay the enforcement of the Judgment in this action pending the disposition of defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of Bond re-

Plaintiff's Exhibit No. 2—(Continued)

quired to be filed by the defendant for such stay and costs.

Dated, October 9th, 1951.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant.

[Endorsed]: Filed October 16, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

ORDER GRANTING SUPERSEDEAS

This matter came on to be heard on Motion of the defendant for a stay pending defendant's appeal to the United States Court of Appeals for the Ninth Circuit, and it appearing to the Court that the defendant is entitled to such stay;

It Is Ordered that the execution of any proceedings to enforce the Judgment entered herein on the 2nd day of March, 1951, be, and the same is hereby, stayed pending the determination of defendant's appeal from such Judgment, upon filing by defendant of a surety bond in the sum of Seventeen Thousand Dollars ($17,000.00), for such stay and costs on appeal.

Plaintiff's Exhibit No. 2—(Continued)

Dated, October 10th, 1951.

CHASE A. CLARK,
District Judge.

[Endorsed]: Filed October 16, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

NOTICE OF APPEAL

Notice Is Hereby Given that the Union Pacific Railroad Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on March 2nd, 1951.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Appellant.

[Endorsed]: Filed October 16, 1951.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

SUPERSEDEAS AND COST BOND

Know All Men By These Presents, That we, Union Pacific Railroad Company, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto A. M. Powell in the full and just sum of Seventeen Thousand and no/100ths Dollars, ($17,000.00), to be paid to the said A. M. Powell, his successors, administrators, executors and assigns, to which payment well and truly to be made, we bind ourselves and our successors, heirs, administrators, executors, jointly and severally, by these presents.

Sealed With Our Seals and dated this 15th day of October, 1951.

Whereas, on March 2nd, 1951, in an action pending in the United States District Court for the District of Idaho, Southern Division, entitled A. M. Powell, plaintiff, against Union Pacific Railroad Company, defendant, a judgment was rendered against the said defendant and the said defendant has, or is about to file a notice of appeal from said judgment to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such that if the said Union Pacific Railroad Com-

Plaintiff's Exhibit No. 2—(Continued)

pany shall prosecute its appeal to effect and shall satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to be and remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,
Principal,

By L. H. ANDERSON,
One of Its Attorneys of Record.

[Seal] CONTINENTAL CASUALTY COMPANY,
Surety,

By KEITH G. MOLLERUP,
Its Attorney-in-Fact and Resident Agent.

[Endorsed]: Filed October 16, 1951.

Plaintiff's Exhibit No. 2—(Continued)

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

The Union Pacific Railroad Company, defendant, having heretofore filed herein its Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, designates for inclusion in the record on appeal the entire and complete record, proceedings and evidence, and requests that you prepare, certify and transmit the same—

That is, all of the original papers in the file dealing with this action or proceeding and the Reporter's Transcript of the evidence and proceedings had during the trial, and the exhibits offered, all in manner required by law and the rules of Court.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing Designation of Record on Appeal, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H.

Plaintiff's Exhibit No. 2—(Continued)

Langroise, Attorney at Law, McCarty Building, Boise, Idaho.

L. H. ANDERSON,
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

REPORTER'S PRAECIPE

To G. C. Vaughn, Official Reporter:

Will You Please prepare, certify and lodge with the Clerk of the above-entitled Court a transcript of all of the evidence and proceedings at the trial, and at all hearings stenographically reported in this action, within the time, or any extensions of time allowed by Rule 73 (g) of the Rules of Civil Procedure, and the number and manner required by law and Rules of Court.

We agree to pay the charges therefor.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,
Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho,

Plaintiff's Exhibit No. 2—(Continued)

a full, true and correct copy of the foregoing Reporter's Praceipe, enclosed in a sealed envelope, postage prepaid, directed to G. C. Vaughan, Court Reporter, Box 1805, Boise, Idaho.

L. H. ANDERSON,
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

NOTICE TO APPELLEE

To A. M. Powell:

The defendant Union Pacific Railroad Company hereby gives notice of its appeal filed herein on October 16th, 1951, to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered herein on March 2nd, 1951, and of its supersedeas bond in the sum of $17,000.00, filed with said appeal.

BRYAN P. LEVERICH,

L. H. ANDERSON,
Attorneys for Appellant.

I certify that on October 16th, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing

Plaintiff's Exhibit No. 2—(Continued)

Notice to Appellee, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H. Langroise. Attorney at Law, McCarty Building, Boise, Idaho.

L. H. ANDERSON,
Of Counsel for Appellant.

[Endorsed]: Filed October 17, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL

It Is Hereby Ordered that the time for filing the record on appeal in the above-entitled cause be, and the same is hereby, extended to and including the 1st day of January, 1952.

Dated, November 19th, 1951.

CHASE A. CLARK,
District Judge.

[Endorsed]: Filed November 19, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

SATISFACTION OF JUDGMENT

For and in Consideration of the Sum of Fourteen

Plaintiff's Exhibit No. 2—(Continued)

Thousand Five Hundred & No/100 Dollars ($14,-500.00), lawful money of the United States, paid by the Union Pacific Railroad Company, a corporation, defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain Judgment rendered and entered in the above-entitled Court on the 2nd day of March, 1951, in favor of the plaintiff and against the defendant in the sum of $15,000.00, with costs in the sum of $92.26, and the Clerk of said Court is hereby authorized and directed to enter satisfaction of record of said Judgment in said action.

Dated, December 15, 1951.

ALBERT M. POWELL.

State of Arizona,
County of Yuma—ss.

On December 15, 1951, before me, the undersigned, a Notary Public in and for said County and State, personally appeared before me A. M. Powell, known to me to be the person who signed the foregoing instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] C. R. CAVANAH,
Notary Public for Arizona,
Residing at Somerton.

Plaintiff's Exhibit No. 2—(Continued)

Com. Exp. 7-29-1952.

[Endorsed]: Filed December 26, 1951.

A. M. Powell vs. Union Pac. R.R. Co.—No. 2776 in the U.S. District Court for the District of Idaho.

MOTION TO DISMISS APPEAL

The defendant, Union Pacific Railroad Company, hereby moves the Court under Rule 73 (a) of the Federal Rules of Civil Procedure to dismiss defendant's said appeal, the record not having been docketed in the United States Court of Appeals for the Ninth Circuit.

Dated, December 24, 1951.

BRYAN P. LEVERICH,

L. H. ANDERSON,

E. H. CASTERLIN,

Attorneys for Defendant.

Order

Upon reading and filing the foregoing Motion, and good cause appearing therefor, it is

Ordered that defendant's appeal herein be and the same is hereby dismissed.

Dated, December 26th, 1951.

CHASE CLARK,

District Judge.

Plaintiff's Exhibit No. 2—(Continued)

I certify that on December 24, 1951, I deposited in the United States Post Office at Pocatello, Idaho, a full, true and correct copy of the foregoing Motion to Dismiss, enclosed in a sealed envelope, postage prepaid, directed to Mr. W. H. Langroise, Attorney at Law, McCarty Building, Boise, Idaho.

L. H. ANDERSON,
Of Counsel for Appellant.

[Endorsed]: Filed December 26, 1951.

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of Complaint, Answer, Verdict, Judgment, Motion for Judgment Notwithstanding the Verdict, Order Denying Motion, Motion for Supersedeas, Order Granting Supersedeas, Notice of Appeal, Supersedeas and Cost Bond, Designation of Record on Appeal, Reporter's Praecipe, Notice to Appellee, Order Extending Time to File Record on Appeal, Satisfaction of Judgment and Motion to Dismiss Appeal in the case of A. M. Powell, Plaintiff v. Union Pacific Railroad Company, Defendant, No. 2776-S, Civil, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

Plaintiff's Exhibit No. 2—(Continued)

In Testimony Whereof, I have set my hand and affixed the seal of said Court in said District this 16th day of September, 1953.

[Seal] ED. M. BRYAN,
Clerk.

Admitted in evidence, Plaintiff's Exhibit No. 2.

Mr. Anderson: If the Court please, I would like to withdraw from the files in this case Plaintiffs' request for admission dated September 1, 1953, and have it marked as an exhibit.

I offer in evidence Plaintiffs' exhibit 3 which is request for admission, and I would like the record to show that no answers were filed in this Court by Hallack and Howard Lumber Company to these requests for admission and under rule 36 each of the following statements are true. I would be glad to read this now but I assume that won't be necessary in view of the stipulation.

The Court: Any objection?

Mr. Eberle: None.

Mr. Elam: No objection.

The Court: It may be admitted.

United States District Court for the District of Idaho, Southern Division

PLAINTIFFS' EXHIBIT No. 3

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

REQUEST FOR ADMISSION

To the Defendant—The Hallack and Howard Lumber Company, and to Third-Party Defendant—W. O. Bedal:

The plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, request the defendant, The Hallack and Howard Lumber Company, and the Third-Party Defendant, W. O. Bedal, within ten days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following statements is true:

(a) That the injuries to the said A. M. Powell at Banks, Idaho, on the 15th day of September, 1949,

were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leases premises (Exhibit "A" attached to the complaint).

(b) That the said W. O. Bedal, his agents, servants or employees were using the premises covered by Exhibit "A" attached to the complaint at the time and place said A. M. Powell was injured in unloading said logs from trucks and the loading of said logs onto plaintiffs' cars for shipment by the defendant The Hallack and Howard Lumber Company and for the use and benefit of The Hallack and Howard Lumber Company under an arrangement whereby the said Bedal performed said unloading and loading of said cars at Banks, Idaho, for and on behalf of the said lumber company in place of said lumber company performing said work itself.

(c) That the defendant, The Hallack and Howard Lumber Company, was the owner of said logs being unloaded and loaded at the time and place the said A. M. Powell was injured.

(d) That the defendant, The Hallack and Howard Lumber Company, paid the said W. O. Bedal for the hauling, unloading, and loading of said logs on the premises leased by the plaintiffs to the defendant The Hallack and Howard Lumber Company at the time and place that said A. M. Powell was injured.

Dated, this 1st day of September, 1953.

/s/ BRYAN P. LEVERICH,
/s/ L. H. ANDERSON,
/s/ E. H. CASTERLIN,
/s/ E. C. PHOENIX,
Attorneys for the Plaintiffs.

I certify that on September 1st, 1953, I served a full, true and correct copy of the foregoing Request for Admission on each the defendant and third-party defendant, by depositing the same enclosed in each of two sealed envelopes, postage prepaid, in the United States Postoffice at Pocatello, Idaho, addressed to their attorneys of record, as follows:

Mr. Oscar W. Worthwine,
Mr. J. L. Eberle,
401 Idaho Building,
Boise, Idaho.

Messrs. Elam and Burke,
Mr. Fred M. Taylor,
P. O. Box 2147,
Boise, Idaho.

that being their last known address.

/s/ E. H. CASTERLIN,
Of Counsel for Plaintiffs.

[Endorsed]: Filed September 2, 1953.

Admitted in evidence: September 21, 1953.

Mr. Anderson: Now, Mr. Clerk, will you please also withdraw from the original file, the answer to these [7] requests filed by W. O. Bedal. So far as our case is concerned I don't know that they are too important but they are a part of the request for admission.

I will now offer in evidence Plaintiffs' exhibit 4, Answer of W. O. Bedal to the request for admission.

The Court: Any objection?

Mr. Elam: No objection.

The Court: It may be admitted.

PLAINTIFFS' EXHIBIT No. 4

United States District Court, District of Idaho, Southern Division

No. 2944

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation,

Plaintiffs,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a Corporation,

Defendant and Third-Party Plaintiff,

vs.

W. O. BEDAL,

Third-Party Defendant.

ANSWER OF W. O. BEDAL TO REQUEST FOR ADMISSION

In answer to the Request for Admission served herein by the plaintiffs above named, this Third-Party Defendant makes the following answers, to wit:

(a) Admits the statement set forth.

(b) Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit "A" attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party complaint; denies that at said particular time said W. O. Bedal, his agents, servants or employees, were loading logs onto plaintiffs' cars for shipment by defendant, Hallack and Howard Lumber Company.

(c) Admits the allegations of paragraph (c) so far as the logs which were being unloaded; that no logs were being loaded at that particular time or place.

(d) Admits that the defendant, Hallack and Howard Lumber Company, paid W. O. Bedal for the hauling and unloading of said logs onto the said leased premises.

Dated this 9th day of September, 1953.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Third-Party Defendant.

State of Idaho,
County of Ada—ss.

W. O. Bedal being first duly sworn, deposes and says that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true.

/s/ W. O. BEDAL.

Subscribed and sworn to before me this 9th day of September, 1953.

[Seal] /s/ FRED M. TAYLOR,
Notary Public for Idaho.

I hereby certify that on September 10, 1953, I served a copy of the within and foregoing Answer of W. O. Bedal to Request for Admission upon L. H. Anderson, one of the Attorneys of record for the plaintiffs herein, by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

L. H. Anderson, Esq.,
P. O. Box 530,
Pocatello, Idaho,

that being his last known address.

/s/ LAUREL E. ELAM.

Service and receipt of a copy of the foregoing Answer of W. O. Bedal to Request for Admission admitted this 10th day of September, 1953.

/s/ OSCAR W. WORTHWINE,

/s/ J. L. EBERLE,
Attorneys for Defendant and
Third-Party Plaintiff.

[Endorsed]: Filed September 10, 1953.

Admitted in evidence September 21, 1953.

EARL W. BRUETT

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Your name is Earl W. Bruett?

A. Yes, sir.

Q. Where do you reside? A. Nampa.

Q. What is your occupation?

A. Assistant Engineer for the Union Pacific Railroad.

Q. Briefly, what are your duties?

A. Checking of leases and drawing maps, staking leases.

Q. Surveying? A. Yes.

Q. Making blue prints?

A. Yes, blue prints.

Q. Is Banks, Idaho, on your territory and within your jurisdiction? [8] A. Yes, sir.

Q. I show you what has been marked as Plaintiffs' exhibit number 5, briefly what is that?

(Testimony of Earl Bruett.)

A. That is a blue print showing railroad track right-of-way and lease to Hallack & Howard Lumber Company at Banks, Idaho.

Q. Is that the same or substantially the same map as attached to the lease, exhibit number 1?

A. Yes, sir.

Q. Is that true and correct as to the physical conditions at Banks? A. Yes.

Q. And was it on September 15, 1949?

A. To the best of my knowledge, yes.

Mr. Anderson: We offer in evidence Plaintiffs' exhibit number 5.

The Court: If there is no objection it may be admitted.

Q. Mr. Bruett, how is the property of the Railroad Company shown on that print?

A. It is shown with red pencil.

Q. And how is the lease from the Railroad Company to the Hallack & Howard Lumber Company shown on the map?

A. It is outlined in yellow.

Q. Does the map show the railroad track through Banks? A. Yes, sir. [9]

Q. How many tracks are there?

A. The main line and the loading track.

Q. Which direction do they run?

A. Generally north and south.

Q. The east track is which?

A. The main line.

Q. And the west track?

A. The loading track.

(Testimony of Earl Bruett.)

Q. That loading track is that where they put the cars and load the logs after they are unloaded from the trucks? A. Yes.

Q. Have you placed on this print some roads that are partly on and partly off the leased premises at Banks? A. Yes, sir.

Q. Are they put on to scale? A. Yes.

Q. Incidentally, what is the scale of that print?

A. It is on the scale of one inch to one hundred feet.

Q. The roads that you have shown on the map, how are they indicated?

A. They are shown with a dashed white line.

Q. A paralleled dash white line? A. Yes.

Q. Do you know what that road is used for, or those roads that you have there?

A. Primarily for logging and for access to the depot. [10]

Q. At one place on the map to the west of the railroad right-of-way line and the leased premises you have some curleycues or whatever you might call them, is that right?

A. Yes, you might call it that.

Q. What does that indicate?

A. That is a clump of trees and brush, growth there.

Q. Will you take a red pencil and mark on that or right opposite that, the word "trees"?

A. Yes.

Q. Where this road or roads are located on this map, what is the general nature of the topography

(Testimony of Earl Bruett.)

there with reference to the railroad tracks, are they higher or lower?

A. The railroad is considerably lower—the roadway is considerably higher than the railroad tracks.

Q. Do you have any figures to show what the elevation is opposite the leased premises to the west as compared with the railroad tracks?

A. Yes.

Q. Will you give us some of those please, starting from either the south or the north end.

Q. Start about 75 feet from the south end into the lease, the elevation of the road is 8.3 feet higher than the railroad track, and a hundred feet more north the roadway is 16 feet higher than the railroad track, one hundred feet further north the roadway is 18.7 feet higher than the railroad track—one hundred feet further north [11] the roadway is 19.6 feet higher than the railroad track and at another 100 feet to the north the road is 23.2 feet higher than the railroad track.

Q. That last elevation that you gave is that in the vicinity of the trees or thereabouts?

A. That would be beyond the trees, further north.

Q. North of the trees?

A. Yes, at about the vicinity of the trees it is 18.7 feet from the roadway to the top of the rail.

Mr. Anderson: I believe that's all.

Mr. Eberle: No cross-examination.

(Testimony of Earl Bruett.)

Cross-Examination

By Mr. Elam:

Q. That varies along there about where the trees are from about 18.7 feet to a little over 20 feet in height? A. To the north, yes.

Q. Do you know where there is a white marker down here along the railroad track on the opposite side of the railroad track, one of the railroad markers, do you have that on there?

Mr. Anderson: What kind of a marker, Mr. Elam?

Mr. Elam: I don't know whether it is a mile marker or a station marker or what.

A. There is a culvert marker, that is probably what you are referring to.

Q. Where is that with reference to these trees that you are talking about, is that straight [12] across?

A. It would be about 75 or 80 feet to the north, if that is what you are talking about.

Q. North of where you had marked for the trees?

A. Yes.

Q. As a matter of fact there are two batches of shrubs or trees out there, don't you have more than one mark? A. Not on this print.

Q. You prepared the print? A. Yes.

Q. And you prepared the markings on there?

A. Yes.

Q. Did you see more than one batch of trees or shrubs there on that one side? A. Yes.

(Testimony of Earl Bruett.)

Q. How many were there?

A. Two clumps as I recall.

Q. Two different places? A. Yes.

Mr. Anderson: We have a big map that will show all that, if you want it, Mr. Elam, the reason we used this is because it is attached to the lease.

Mr. Elam: I don't object to this, I am just asking questions about the location of these things.

Q. Now, with reference to the drop there—that is what you mean by the elevation—where the road is down to the track?

A. Yes, to the top of the rail. [13]

Q. To the level next to the railroad?

A. Yes.

Q. And next to the railroad track there is more or less of a level space, is there not?

A. Yes.

Q. Along the railroad track? A. Yes.

Q. Can you give me approximately what the width of that space is? A. It varies.

Q. And would be approximately what?

A. Between 15 and 20 feet.

Q. And then you come to a very substantial slope do you not? A. Yes.

Q. A very steep slope? A. Yes.

Q. And the road is right on the very edge of that slope? A. Yes.

Q. And the logs coming off the trucks, as they fall down, they hit the slope itself there just as it comes over the edge, is that right?

(Testimony of Earl Bruett.)

A. I have never seen them unload logs there so I couldn't tell you that.

Q. Now, do you know how far it is in a horizontal line from the edge of the road to the place where you come down about level?

A. At what place—at about where this clump of trees are. **[13-A]**

Q. That varies a little bit does it? A. Yes.

Q. Give approximately what it is there then.

A. It is right at 47 feet.

Q. That is the distance down the slope?

A. Yes.

Q. During which you had the drop that you mentioned? A. Yes.

Q. So far as the railroad track is concerned there on your plat you draw the railroad with one line, what is that line?

A. That is the center line of the track.

Q. What is the distance between the center line and the edge of the property, the east side of the property which was leased to Hallack and Howard?

A. From the center of the side track to the edge of the lease is 8.5 feet.

Q. That varies a little bit from the north to the south end but along in where you have designated it is 8.5 is that right? A. Yes.

Q. That is from the center of the track to the leased property? A. To the edge of the lease.

Q. How wide is the track?

Q. Four feet eight and a quarter inches between rails.

(Testimony of Earl Bruett.)

Q. So your leased property would be about a little over six feet from the west line of the rail?

A. Yes. [14]

Q. Have you been up there lately?

A. About a week ago.

Q. Since the Boise-Payette took over that road landing the top of the road has been widened out?

A. It looked like it to me—I didn't check any measurements but it looked wider than it had been.

Q. There had been some bulldozing on the bank side—the west side? A. Yes.

Q. There had been rocks and debris pushed over the bank and down the hill? A. Yes, sir.

Mr. Anderson: Is that since the Powell accident?

Mr. Elam: Yes.

Mr. Anderson: I move to strike that and object to it as being immaterial.

The Court: Yes, any alterations or corrections made since the accident would not be material.

Mr. Elam: That's all.

Mr. Anderson: Nothing further.

GEORGE HIBBARD

called as a witness for the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Your name is George Hibbard? [15]

A. Yes, sir.

Q. Where do you reside Mr. Hibbard?

(Testimony of George Hibbard.)

A. Banks.

Q. Have you resided there for some time?

A. Yes.

Q. Where were you working—strike that—were you working at Banks on September 15, 1949, when Mr. Powell was injured? A. Yes.

Q. Were you acquainted with Mr. Powell?

A. Yes.

Q. Who were you working for at that time?

A. Mr. Bedal?

Q. W. O. Bedal? A. Yes.

Q. What were you doing?

A. Unloading trucks.

Q. How were you unloading them?

A. With a cat—bulldozer and boom.

Q. Did you operate that yourself?

A. Yes.

Q. At the time in question did you unload the logs? A. Yes.

Q. At the time Powell was injured?

A. Yes.

Q. Where were you—to the west of the truck?

A. East, on the side. [16]

Q. How did you unload the logs off the truck?

A. With a cable.

Mr. Eberle: We object to that as being entirely immaterial.

Mr. Anderson: It is preliminary but I will not pursue it further.

Q. You operated the cat that unloaded the logs?

A. Yes.

(Testimony of George Hibbard.)

Q. Are you generally familiar with the map, with what the map shows? In other words, can you make a mark on that map as to where the truck was standing when you unloaded the logs from it?

A. Yes.

Q. Will you take a red pencil and make an x where the truck was standing?

The Court: I take it this is the truck that the slab came from.

Mr. Anderson: Yes, that is right.

Q. Now, you have marked an x with a red pencil about opposite a clump of trees that was there?

A. Right close.

Q. And where you marked with an x is where the truck was standing when you unloaded the logs immediately following which Mr. Powell was injured? A. Yes. [17]

Mr. Anderson: If your Honor thinks that I should not go into these things, of course, I will not do it but I would like to ask a few questions.

The Court: Go ahead Mr. Anderson.

Q. When these logs were unloaded off the truck and the ones in question, that is, when Mr. Powell was injured, would they be pushed to the west or the east toward the track?

A. Yes, toward the track.

Q. What was done with these logs after they were unloaded?

A. They would be loaded on the cars.

Q. Do you know whose logs they were—who owned the logs? A. Hallack & Howard.

(Testimony of George Hibbard.)

Q. Who was hauling the logs, unloading them and loading them for Hallack & Howard?

A. Bedal.

Q. Did the Railroad Company have anything to do with that operation?

Mr. Elam: We object to that as incompetent, irrelevant and immaterial. A. No.

The Court: He has answered it and the answer may stand.

The Court: We will recess until 2 o'clock this afternoon.

September 21, 1953, 2:00 P.M.

Mr. Anderson: I have no further questions, [18]

Mr. Eberle: We have no cross.

Cross-Examination

By Mr. Elam.

Q. Mr. Hibbard, I think one thing that should be cleared up in regard to unloading the logs, I believe you said that you used a cat in unloading them? A. Yes.

Q. How did you use the cat?

A. To pull off with the line and boom.

Q. That was for the purpose of pulling the chains or the lines so the logs would be loosened?

A. Just to dump the logs over.

Q. Which side of the load of logs would you be on? A. I would be on the west.

Q. That is on the opposite side of the load of logs from where the railroad cars were down below?

(Testimony of George Hibbard.)

A. Yes.

Q. You were doing that in the same manner that you had always done it before?

Mr. Anderson: I object to that as immaterial.

A. Yes.

The Court: The objection is sustained and the answer may be stricken.

Q. And you fix the place at about where you marked it there on the map? A. Yes. [19]

Mr. Elam: I think that is all from this witness at this time, we may want to call him later.

I would like to recall Mr. Bruett for a question or two.

EARL W. BRUETT

recalled for further cross-examination, having heretofore been duly sworn, testifies as follows:

Cross-Examination

By Mr. Elam:

Mr. Elam: I will ask that Mr. Bruett be handed the map exhibit 5 which is admitted.

Q. I will ask you if you will mark on the blueprint as the place designated as the trees and identified by both you and Mr. Hibbard, the height of the road over and above the railroad track, what is that? A. That elevation is 18.7.

Q. Will you mark that on that print in red pencil. A. Yes, sir.

Q. That is the height of the edge of the road above the level of the railroad track?

A. Yes.

Mr. Elam. That is all.

Mr. Anderson: I would like to have this marked as an exhibit, this is exhibit 6.

At this time, if the Court please, I offer exhibit 6 which is a statement of expenses and attorneys fees incurred by the Union Pacific Railroad Company in the [20] Powell case, and in connection with this exhibit we have entered into this stipulation. "If the plaintiffs or either of them are entitled to recover in this action it is hereby stipulated by and between the parties hereto through their respective counsel that the items listed on the attached exhibit were expended by the plaintiff or one of them in the case of A. M. Powell vs. Union Pacific Railroad Company, and the same may be received as evidence in this case subject only to any objection that may be made and the ruling thereon by the Court as to relevancy or materiality as to any or all items.

It is further stipulated that as to two of said items, that is the claim agent's time in the amount of $301.97 and the attorney's fee in the amount of $1,000.00, said items were incurred by regular employees of the plaintiff and said amounts were determined by auditing the hours and days worked by said employees and the charge therefore made according to their regular monthly or annual salary. I offer exhibit 6 in evidence.

The Court: Without objection it may be admitted.

PLAINTIFF'S EXHIBIT No. 6

Statement of Expenses and Attorney's Fee Incurred by the Union Pacific Railroad Company Covering the Investigation, Defense, Appeal, and Final Disposition of the Case of A. M. Powell vs. Union Pacific Railroad Company, Case No. 2776, in the United States District Court for the District of Idaho, Southern Division:

Claim Agent's Time .....$	301.97
Claim Agent's Expense	51.12
Witnesses at the trial—Time and Expense	216.09
Marshal's Fee—Serving subpoenaes	20.10
Transcript required by Court on Motion for Judgment Nov.	182.70
Appeal Fee	5.00
Premium on Bond on Appeal	300.00
Attorney's Fee	1,000.00
Paid in Satisfaction of Judgment	14,500.00

Admitted in evidence September 21, 1953.

Mr. Anderson: I have had the transcript in the case of A. M. Powell vs. Union Pacific Railroad Company marked as Plaintiff's Exhibit 7 which is a transcript of the evidence and other proceedings of the Court in that case, motion for directed verdict and instructions. I would like to read at this time

portions of the testimony. [21] I offer this in evidence at this time.

The Court: It may be admitted.

Mr. Elam: I think the ones that were not stipulated to were Powell and Anne Powell.

Mr. Anderson: I don't propose to read Anne Powell's.

Mr. Elam: And Russell Eldridge and Addelore Revett, Dr. Simonton, Boyd Tovey. The only ones that we stipulated that could be read into the record was the testimony of Harry Hansen, Ritter, Parrish, and Sage.

The Court: This will be admitted as against the Hallack & Howard Lumber Company.

Mr. Anderson: I would like to read from the testimony of Albert M. Powell, commencing on page one of the transcript.

The Court: I might say if there is any portion of this which would save a duplication in again reading it to the jury that you have no objection to, it might save you a little time and save the Court time and the jury's time if you would specify the ones that you don't have objection to. That might save the reading of it twice, because I am now principally concerned with the case of the Union Pacific against the Hallack & Howard Lumber Company, but I am letting this testimony go in as to all of the parties so as to save duplication.

Mr. Elam: The stipulation was made between all of the attorneys as to those particular witnesses.

The Court: What are the names of those particular witnesses. [22]

Mr. Worthwine: It was stipulated as to the testimony of Harry F. Hansen, Charles Ritter, Albert Parrish and Howard Sage.

The Court: That testimony may be admitted as against all of the parties to the suit, and any balance of the transcript that you desire to use may be used only as to the Hallack & Howard Lumber Company.

Mr. Elam: We will also stipulate that the instructions which are a part of the original transcript may be admitted.

The Court: I am very sure that the instructions in this case are going to be different than the instructions in that case. They may be admitted however, if there is no objection. You may proceed, Mr. Anderson.

(Mr. Anderson reading.)

ALBERT M. POWELL

being called as a witness by the plaintiff, after being duly sworn, testifies as follows:

Direct Examination

By Mr. Langroise:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Who were you employed by on the 15th of September, 1949?

A. The Union Pacific Railroad Company.

The Court: Mr. Anderson, I don't want to interrupt you, but I have an idea that all counsel [23] are going to be faced with this situation that you

(Testimony of Albert M. Powell.)

are faced with now, if some of counsel would act as a witness for you and take the place of Mr. Powell, it would be easier for the jury to follow.

Mr. Anderson: That is right and it is the proper procedure except for the fact that I am jumping from portion to portion and it might be difficult for them to follow me. I will try to make it plain which is the question and the answer.

Q. Who were you employed by on September 15, 1949? A. Union Pacific Railroad Company.

Q. And where were you located?

A. Banks, Idaho.

Q. What was your position?

A. I was car inspector.

Q. And what were your duties as car inspector?

A. To make repairs to damage to log cars.

Q. Had you been employed by the Union Pacific Railroad Company prior to September 15th?

A. Yes, sir.

Q. When did you start to work for the Union Pacific Railroad Company?

A. It was either 1934 or 1935.

(Now I will go to about the middle of page 3.)

Q. At Banks, Idaho, during 1949 were any logs being loaded there? A. Yes, sir. [24]

Q. When did you go to work at Banks?

A. June first.

Q. Of what year? A. 1949.

Q. When you went up there were any logs being

(Testimony of Albert M. Powell.)

loaded there? A. Yes, sir.

Q. Will you just describe to the Court and Jury how the logs were loaded?

A. There was a track running north and south, the same way as the main line, a side track that was practically straight with a little curve, and about three feet or a few feet west of this was a row of bunker logs, two feet or three feet logs, laid in a row, those bunker logs were to keep the logs from rolling across the track or against the cars. The trucks would come in west of that on a little private road, and there they would, with a caterpillar and hoist unload the trucks, each truck load may have from three to six thousand feet in a load and they would knock the chains off the binders and the caterpillar would wind this drum, when they would hitch to the bottom, would wind the drum and lift the load off the trucks and then that load of logs would roll down and hit the bumper logs and they would stop if the bunker logs stopped them. They had a loading machine on a flat car that propelled itself, it would load one-half a flat car and back itself up by cable and he could reach out and get the logs with two men [24-A] swinging them, he could load them on the car and take two binders on the loads of logs and that would form the tension that held the logs. My duty was to inspect this load as to being safe for the company to haul to Cascade. I don't know the distance exactly to Cascade. I was around there to either accept it or to reject it after it was loaded. After he had loaded one half of the

(Testimony of Albert M. Powell.)

car and put the binders on, then he would back up one half a car length and load the rest. That was a day's work just to do that over and over, dumping the loaded trucks and picking them up and loading them on the cars.

(I am skipping a couple of lines.)

Q. How high above the bunker logs was the place that they unloaded from the trucks?

A. From where the trucks were?

Q. Yes, sir.

A. Well, it would vary, there was a variation in the road, the road wasn't straight and that distance would vary from 70 to possibly over 100 feet. It was a very steep incline, you couldn't hardly walk up there, you would have to turn and go up sideways in some places because it was so steep.

(Now I go to page nine of his testimony.)

Q. Is that loading track within two or three feet of the bunkers? A. Yes, sir. [25]

Q. While you were employed there at that time prior to September 15th, did any more bunker logs make their appearance at this loading place?

A. Yes, the bunkers filled up and they added another log at the top.

Q. Prior to the 15th of September, 1949, how many bunker logs did they have about the middle of the bunker? A. Three.

Q. And that would extend that bunker how high from the ground or the track?

(Testimony of Albert M. Powell.)

A. Well, logs were two and half or three feet, and the largest they could find, and that would run it above the track six or eight feet.

(I am now going to the bottom of page 10.)

Q. And what was the condition of the area immediately back of the bunker logs?

A. You mean between the bunker logs and the track?

Q. No, I mean the other way. A. West?

Q. Yes.

A. It was filled up with debris, limbs, small logs and bark.

(Now I am going to page fourteen, toward the top.)

Q. I direct your attention to the 15th of September, 1949, and will ask you to describe to the jury the condition of the debris and materials back of the bunker logs with respect to the top? [26]

A. It—that is, the trash and debris and bark and so on was up to the top of the bunker logs and in some places it was spilling over behind, between the bunker and the cars.

(I am now going to page 15, toward the bottom.)

Q. On the morning of September 15, what time did you go to work? A. At eight o'clock.

Q. Where did you first go to work?

A. Around the string of cars. I had possibly

(Testimony of Albert M. Powell.)

two or three loads on the south end of the track. I made a minor repair or two on some loads and then I went up on the hill, on the road, and got a drink of water and walked off down to the north end of this train of cars, this string of cars that was standing there, and go on top and walked on top of the empty cars to inspect the chains, the "U" plates and chains and walked up to the empty car next to this loading machine, the loading rig was on the next car.

Q. Where was the loading rig with respect to the loaded cars?

A. There was loaded cars in front of the loading rig, possibly six or seven, I can't remember, but there was loaded cars in front of it. I stopped on the last empty car next to the car that he was on, he occupied one car with this rig, and then I figured this load of logs was being dumped.

Q. Did you do anything?

A. Did I see any damage, is that what you mean? [27]

Q. No—you say that you got on the car where the loading rig was? A. Next to it, yes, sir.

Q. Did you notice anything above, any truck?

A. A load of logs ready to be dumped, yes. There was a load ready for dumping, or in the act of dumping.

Q. And what did you do?

A. I stepped up off the top of this log car on to where the bunker logs came together. I stepped on the bunker log and stood there a minute on the

(Testimony of Albert M. Powell.)

end of the bunker log facing the west where they were loading.

Q. What was the bunker log's height with respect to the empty car, the top of the empty car?

A. Oh, possibly two feet or more at that point.

Q. I beg your pardon.

A. They were about two feet or more at that place.

Q. Lower than the empty car?

A. No, higher than the empty car, possibly two feet.

(Now, I am skipping the next question, this is on page 17.)

Q. On to the bunker logs?

A. Yes, and I sat down on the top of the bunker logs in this position (indicating) with my feet on the end of another log sticking out.

Q. Will you explain or describe how you were able to sit on the top facing west?

A. That is right, and I sat on the top facing west. [28]

Q. And still have your feet on the bunker logs?

A. They didn't close up tight there, there was a space of two or three feet that they lacked coming together. You could walk between them, there would be a little space, a sort of partition where the bark and stuff would sift down on to the track.

Q. On ahead of this loading machine, up ahead I mean from the direction that you were walking, what was on the car next to it?

A. Ahead of the loading machine?

(Testimony of Albert M. Powell.)

Q. Yes. A. Logs.

Q. Where was the trucks on the road that had the load of logs on it with respect to where you went over to sit down?

A. It was between 60 and 70 feet south of me, maybe 70 or 80 feet, and it was west up on this road.

Q. About 60 feet south? A. Yes, sir.

Q. And where was that with respect to the loaded cars on the loading tracks? A. From me?

Q. Where was the truck?

A. It was directly or almost directly west of that 70 or 80 feet and up this bank.

Q. Would that be directly up hill?

A. That is right. [29]

Q. Down at the bottom of the bunker, on this track was loaded cars of logs?

A. That is right.

Q. Was there anything else there?

A. I don't just understand.

Q. Why didn't you step up to this bunker and sit down on it or rather why did you do that?

A. Well, that was as far as I could go because of the loading rig, it was on the next car, and I knew that he would want some of those logs that were being dumped to finish out the half car.

Q. They were not being dumped at that time?

A. They were just preparing to dump them, that was as far as I could go. Naturally, I would step out of his way, he had a line to pull him back when he loaded one-half a car.

(Testimony of Albert M. Powell.)

Q. The logs would be loaded—strike that—where would you be when they were unloaded off the truck? A. You mean at that time.

Q. Well, generally?

A. I would get in a safe place.

Q. You didn't go below the bunker where they were unloading logs? A. No.

Q. After you stepped over there was anyone else over there at that time?

A. There was three other men, three men on this top bunker log. [30]

Q. When you stepped over? A. Yes, sir.

Q. Who were they?

A. Mr. Ritter, Mr. Hansen and Mr. Parrish, that I know.

Q. And where were they in relation to you?

A. They were either sitting or squatting on this bunker log.

(I am now turning to the top of page 20.)

Q. You say that you were facing west?

A. Yes, sir.

Q. That would be in the general direction of the loaded cars? A. Yes, sir.

Q. And what happened, if anything?

A. I just stepped up and sat down this way (indicating) on the end of the log. There were these three men here to the right, the truck dumped the logs and I looked back down the track on the loads and I heard the logs strike the loaded cars, I remember looking at the rig boom and it was quiver-

(Testimony of Albert M. Powell.)

ing after this lick. I am sure that Mr. Ritter yelled "look out there" and I looked, I glanced and throwed my head over to one side, there was a slab coming through the air, three or four feet from me, coming from the south. I threw my arm up this way (indicating) and it hit me here (indicating). It hit and raised me in the air. I remember falling back and I remember my feet being higher than my hands. I fell down between the bunker bottom as I went down. [31] I struck my back, between my back and the hip, and then I rolled over on my stomach and crawled out between the cars. On the east side of the cars I pulled up to the side of the car and took a few steps in the direction of my home and I began to see black things in front of my eyes and I got dizzy. I made it back and I laid back over on the car, I think it was the car that the loading rig was on. An employe, Mr. Hansen, who was operating the loading rig came to me and got me by the arm and said "you better go to the doctor" and I said "no, I will go home and rest a while and I will be all right," and then I just passed out for a few moments. I got very sick to my stomach and Mr. Hansen put me in the car and Mr. Ritter drove me to Emmett to the Emmett hospital.

(Now I skip a couple of questions, to the bottom of page 21.)

Q. Well, when you saw it, that is, the slab, from what direction was it coming?

(Testimony of Albert M. Powell.)

A. Directly from the left or the south.

Q. That would be in what relation to the position of the loading track where the cars were on the truck, and the empties?

A. The loading track running north and south?

Q. Yes. Do you remember, the loading track also runs north and south? A. Yes.

Q. And this came, the slab, from the south? [32]

A. Yes, sir.

Q. And do you remember what time you arrived at Emmett?

A. It must have been about 11 o'clock.

Q. What time did this accident occur?

A. Around ten o'clock.

Q. Upon your arrival there, what doctor, if any, saw you? A. Dr. Reynolds.

(Now I am going to page 48, this is cross-examination by Mr. Anderson.)

Cross-Examination

By Mr. Anderson:

Q. The tracks, that is the railroad at Banks runs generally north and south? A. Yes, sir.

Q. And in addition to the tracks, that is, the rails that the through train goes on, there is a loading track immediately to the west of the main line?

A. Yes, sir.

Q. And is that where the logs were loaded—strike that—is that where the empties are placed for loading the logs? A. Yes, sir.

(Testimony of Albert M. Powell.)

Q. Do you know how many cars that track, the loading track, will hold?

A. Eighteen or twenty.

Q. When they commence to load these cars do they have to move those after they are loaded, or do they dump to one car. [33] And when that car is loaded, do they dump to the next?

A. They try to start on the extreme south end and load on up toward the north.

Q. So that the truck up on the road would try to dump the logs to the particular car that is being loaded at that time?

A. Wherever they need the logs.

Q. And that road to the west of the load track, the road that the trucks went on, was that road continuous from the north end of the loading track to the south end of it?

A. Yes, sir, it is continuous—well, it branched off to the north but I would say it was continuous, yes.

Q. That was the road that these trucks would pull on and then they would dump the logs to whatever railroad car they were loading?

A. Yes, sir.

Q. And is that road all the way, all the way through there for 18 or twenty cars, car lengths, that road on the hill, that is my question?

A. Yes, up quite a ways.

Q. And on this particular date, the 15th of September, 1949, do you know which car you were load-

(Testimony of Albert M. Powell.)

ing, was it north or south or about the middle of that loading track?

A. It was a little south of the middle.

Q. And from that point, where the truck was on the road, was that higher or a lower elevation—let me change that, was it at the highest or the lowest elevation that the [34] truck could be on that road?

A. Well, I would say it was just about intermediate, it could be a little higher to the north and it could be a little lower to the south.

(I am skipping one question and answer.)

Q. Who was it that hauled those logs in there, the logs that were to be loaded?

A. I was the logging company Bedal and Smith.

Q. The railroad company had nothing to do with that?

A. No, they didn't have anything to do with them.

Q. About how far would you say it was from this bunker west of the track up to where this truck loaded with logs would be?

A. I think I would be safe in saying that it is between 70 and 90 feet.

Q. You never measured it?

A. No, sir, I didn't.

Q. Would you say the road where the truck was standing and dumping the logs was about 20 feet higher than the level of the tracks?

(Testimony of Albert M. Powell.)

A. I would be unable to say exactly the distance it was higher, I know it was awful steep.

Q. I was wondering if you had any judgment on that?

A. Well, I would be unable to figure the exact height, but it would be 20 feet, I know that, it would be twenty feet up that steep hill to reach this road. [35]

Q. Would you say it would be 25 feet higher than the tracks there?

A. Yes, I would say at least that.

(I am going to the top of page 53.)

Q. And the purpose of the bunker was to protect the cars, to stop the logs and to protect the cars from being damaged, and to hold them for the purpose of loading them on the cars?

A. To stop the logs from hitting the cars and to stop them from going on to the main line and to damage anything or anybody on the other side.

Q. Who put those logs in there?

A. The logging company.

(I am skipping a couple of questions.)

Q. From the bunkers back to the west, toward the hill, where they dumped the logs, how far would this be level from the bunker back toward the hill, that is, is this bark and stuff that has been mentioned, is that level for some distance before you get to going up the slope of the hill?

A. It is level for a foot or two from the top of

(Testimony of Albert M. Powell.)

the bunker, from the top of the bunker log west it is level for about a foot or two and then there would be a dip there, a kind of ditch, then it was level to the extreme foot of the hill, and then, of course, nothing could congregate on this steep hill.

Q. Mr. Powell, how far is it from the bunker to the foot of the hill?

Q. Well, it would vary from 20 feet, that was their working [36] space, about 20 feet wide.

(And then on page 56 near the top of the page.)

Q. And those logs were shipped to Cascade?

A. Yes, sir.

(Near the bottom of page 58.)

Q. Who did clean this logging landing?

A. The logging company.

Q. And what was that company's name?

A. Bedal and Smith.

Q. And what did they do when they cleaned the landing out, did they throw it over the tracks toward the river, toward the east?

A. Yes, sir, for a thorough cleaning they would bring in a carry-all and would clean it plumb down to the river and lay all of the bunker logs up there, that is, they got them out of the way and would make a clean sweep.

(Near the bottom of page 63.)

Q. And the first thing that you knew about this was, that is, the first thing that you knew about this

(Testimony of Albert M. Powell.)

piece of log or slab was just the instant before it struck you. I think that might have been three or four feet away, just in time to throw up your arms?

A. Yes, sir, that is right.

(Page 65 near the middle.)

Q. You were generally looking to the west and someone shouted when this piece started to fly through the air? [37]

A. Yes, sir, I was looking southwest at this load.

Q. Toward the truck?

A. Yes, sir, they hit the car, I had just arrived there about a half minute and somebody shouted.

(Page 69—this is re-cross.)

Q. You did know that particular piece of ground leading from the tracks up to the road for a length of 18 or 20 cars was all leased to the Howard and Hallack Lumber Company? A. No, sir.

Q. They were doing all of the unloading, or Bedal and Smith was doing it for them?

A. Yes, sir.

Q. They were the Howard and Hallack Lumber Company logs? A. Yes, sir, I think it was.

Q. And they supplied the bunkers did they not?

A. The bunkers were supplied or built of the largest logs they could get.

Q. Yes, but they were located there by the lumber company or by the logging company?

A. Yes, sir, by the logging company.

Q. And the cleaning out of the debris was done by the logging company? A. Yes. sir.

(The next is the testimony of Harry F. Hansen at page 98 of the transcript in the case of Powell vs. Union Pacific.) [38]

HARRY H. HANSEN

called as a witness by the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Langroise:

Mr. Worthwine: This is the testimony of one of the witnesses that was stipulated to by counsel.

The Court: Yes, this goes to all of the parties.

Q. Where do you reside, Mr. Hansen?

A. Boise, Idaho.

Q. During the summer of 1949 where were you employed?

A. At the Bedal-Smith Logging Company at Banks, Idaho.

Q. And what were your duties there?

A. Loader on the train at Banks.

Q. In connection with your duties did you operate what has been described as the loader that operated on the cars that loaded the railroad train?

A. Yes, sir.

(Now, I go to page 101 just below the middle of the page.)

Mr. Elam: I think this all should be read and

(Testimony of Harry H. Hansen.)

I will stipulate that all this testimony should be read. It isn't very long.

The Court: Very well, read it all.

Q. And were you so engaged on June 1, 1949?

A. Yes, sir.

Q. Had you been there some time before June 1, working there? [38-A] A. Yes, sir.

Q. How long?

A. I think it was about the 7th of May that I was employed.

Q. Did you work there from the 7th of May to and through the 15th of September, 1949?

A. Yes, sir.

Q. Are you acquainted with the Plaintiff A. M. Powell? A. Yes, sir.

Q. Did you see him in connection with your work at Banks from June 1st including September 15, 1949? A. Yes, sir.

Q. Did you know what he was doing?

A. Yes, sir.

Q. What was he doing?

A. He was car inspector or car man.

Q. For whom? A. The Union Pacific.

Q. What did you observe him doing around there?

A. He always checked the loads every morning and took care of his train or the cars.

Q. Did he, on occasions, repair cars?

A. Yes, sir.

Q. Was he continuously so engaged, working there while you were there from June 1st on?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

Q. What did you observe about his physical condition during [39] that time?

A. He was about to perform his job.

Q. And did he do so? A. Yes, sir.

Q. What did you observe about whether he was active? A. He was normally active.

Q. Did you hear some testimony in connection with this large railroad jack or jacks?

A. Yes, sir, I did.

Q. Have you seen them? A. Yes, sir.

Q. Did you hear a description of them given?

A. Yes, sir, I did.

Q. Have you had to handle any of them yourself?

A. Yes, sir, I have lifted them, and they are awful heavy.

Q. Have you seen him, Mr. Powell, handle those jacks? A. Yes, sir.

Q. Was there an occasion that you recall when the trucks under one of the loaded cars was knocked off the rails? A. Yes, sir.

Q. Do you know whether those trucks were placed back on the rails? A. Yes, sir.

Q. By whom? A. Mr. Powell.

Q. Did he have help to do that? [40]

A. Yes, he did it alone.

Q. My question was, did he have help?

A. He done it by himself, it was his job and he did it.

Q. While he was there did you see him using

(Testimony of Harry H. Hansen.)

those heavy jacks? A. Yes, sir.

Q. Did he have difficulty in handling them?

A. Not that I saw.

The Court: I am wondering if you want all of this read as to the condition of Mr. Powell's health and his injuries, that has nothing to do with this case.

Mr. Elam: No, I don't care about that part.

The Court: I am wondering if you want to take the time to read all that.

Mr. Elam: No, not about Mr. Powell.

The Court: This is a simple question involved here and all this has been settled in another case. Do you want him to leave out that part of it or do you want him to continue to read.

Mr. Elam: No, not that portion.

The Court: I suggest that Mr. Anderson go ahead the way he was doing and any part of it that he doesn't read and you want to read that you do so.

Mr. Anderson: Then I will start in the middle or just below the middle of page 101.

Q. Of what did that bunker comprise—of what was it made?

A. It was a large log or logs that were used there. [41] We set it there for the protection of the cars and to keep the logs from coming against the tracks.

Q. What size were those logs in the bunker?

A. I would say about three feet in diameter.

Q. From the time that you started to work there

(Testimony of Harry H. Hansen.)

up to and including the 15th of September, 1949, had the number of logs in that bunker increased?

A. Yes, sir.

Q. About how many were there on the 15th of September and for sometime prior thereto?

A. Just before, it was about three deep, they were large sized logs.

Q. Three large sized logs?

A. Two or three.

Q. Why were a number of logs placed one on top of the other, if you know?

A. They were laid there to keep the bark and stuff from coming over and down on the track and to stop the logs from coming on the track.

Q. But if you started out with one why was the second and the third put on?

A. They put them on as the landing filled up.

Q. As the landing filled up behind the bunkers?

A. Yes, sir.

Q. Directing your attention to the 15th of September, 1949, what [42] was the condition of the landing behind the bunker logs about the center part or a little to the south of the center, as to what condition there was back of that?

A. Well, we had bark formation and dirt filled up, it was filled with bark.

Q. And what was the situation prior to the 15th of September, 1949, as to whether or not this bunker was stopping the logs as they were unloaded from the trucks?

(Testimony of Harry H. Hansen.)

A. Well, when the new bunker was put in it had more stopping force than when it filled there.

Q. After these three, or the third log was put on, how long had it been filled in back of that prior to September 15, 1949?

A. It filled up gradually as they worked on.

Q. Was it filled prior to September 15, 1949?

A. Yes, I would say that it was filled at that time.

Q. How long had it been filled prior to the 15th of September, 1949?

A. Not over a week or so.

Q. After it had filled up, what was the condition with respect to the logs going over this bunker when they were unloaded from above?

A. Well, we had trouble with the logs coming into the flats, into the railroad cars.

Q. Was that just once in a while or was it frequently?

A. It was a general condition more or less. [43]

Q. That had been true for a week or more before the 15th of September, 1949?

A. It happened all of the time, all through the operation since the bunker filled.

Q. Whenever the bunker got filled this would occur? A. Yes, sir.

Q. How long had it been occurring as you say, I believe—did you say all of the time after this third log was put in the bunker in the area around the center of the bunker and south of the center?

A. A week or two, I would say.

(Testimony of Harry H. Hansen.)

Q. Directing your attention to the 15th of September, 1949, were you at work that day?

A. Yes, sir.

Q. Was Mr. Powell at work that day?

A. Yes, sir.

Q. Where was Mr. Powell working on his repair work generally? A. On the railroad siding.

Q. Where would that be with respect to the bunker logs that we have been discussing?

A. His work consisted of fixing the cars. Normally his work would be on the side where they were knocking off the stuff.

Q. That is on the side next to the bunker?

A. Yes, sir.

Q. How far was this bunker away from the cars themselves? [44]

A. Well, it varied in distance from one foot to about three feet.

Q. It would vary from one to three feet?

A. Yes, sir.

Q. Do you recall or were you present when Mr. Powell was injured that day?

A. Yes, sir, I was.

Q. Calling your attention to just prior to his injury—prior to the time he was injured, where were you at that time?

A. I was just about six feet from him.

Q. About six feet from him?

A. Yes, sir.

Q. Were you on the logs, or where?

A. On the same log that he was on.

(Testimony of Harry H. Hansen.)

Q. Then I take it you were about six feet north of him? A. Yes, sir.

Q. Was there anyone between you and Mr. Powell? A. Yes, sir.

Q. Who?

A. I think there was two men, Mr. Ritter and Mr. Parish.

Q. Where were they with respect to this log?

A. They were on it too.

Q. Was this the top bunker log?

A. Yes, sir.

Q. Where was your loader with respect to where you and Mr. Powell and the other men were on this log? [45] A. Over to the south of us.

Q. The loader was south of that?

A. Yes, sir.

Q. How much room did this loader take?

A. It occupied one car.

Q. And what was to the south of the loader?

A. Loaded cars of logs.

Q. When did Mr. Powell,—did you see where Mr. Powell came from when he got on the log of this bunker?

A. I would not be able to answer that, I was on the machine on the other side at that time, and I just entered or came there myself. I had come around the machine prior to the accident and stopped on the log myself.

Q. Was Mr. Powell there?

A. He just came there too.

Q. About the same time that you did?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

Q. What direction were you facing, if you remember? A. I don't remember that.

Q. What was the reason for your coming on the log or going around there—was there anything being done there?

A. Well, we shut the machine down waiting for them to dump a load of logs.

Q. And they were dumping a load of logs.

A. Yes, sir.

Q. Where? [46] A. Off the truck.

Q. And that truck where they were dumping was above where this bunker was? A. Yes, sir.

Q. It was on the road that has been described here by witnesses? A. Yes, sir.

Q. What happened shortly after this load of logs was dumped?

A. To describe it, shortly after the load was broke down someone hollered "look out" and I jumped up and this slab—I didn't see it at the time, but I saw it knock him off this log and the remainder of the load come down against the cars.

Q. The railroad cars, you mean? A. Yes.

Q. Describe what you saw happen to Mr. Powell after this slab hit him?

A. Well, it knocked him off the log and his head hit the frame of the car and it doubled him up and he fell down between the car and the brow of the hill. He turned over and crawled off under the car and I went over the top and met him on the other side.

(Testimony of Harry H. Hansen.)

Q. What did you observe about his condition at that time?

A. He was hurt. I noticed that right away.

Q. What did you do, if anything, and what did he do?

A. Well, I convinced him that he needed medical aid and with the aid of the other fellows we got a car down and sent him to the doctor. [47]

Q. While he was there what did you observe about his condition?

A. I examined his back and there was a large skinned place on his hip and he was kind of in a semi-coma there, and for a few minutes he was not able to stand, he was weak from shock.

Q. He was loaded in a car and sent away immediately? A. Yes, sir.

Q. Did you examine this slab that hit Mr. Powell? A. Yes, sir.

Q. Would you describe it to the Court and Jury?

A. Well, in length it would be nearly four feet long and probably weigh between 60 and 75 pounds.

Q. After Mr. Powell was injured and was taken away in a car, did you remain there for a while?

A. Yes, sir.

Q. Do you remember how long you remained there?

A. Oh, I would say until two-thirty in the afternoon.

Q. Between the time of the unloading of this truck load and the injury to Mr. Powell, had any-

(Testimony of Harry H. Hansen.)

thing been done to change the physical condition of the bunker where the logs were unloaded or the area immediately back of them?

A. Well, I am positive that we loaded a half car of logs.

Q. Did anyone do anything to change the amount of debris back of the bunker logs after this accident happened and during the time you were there?

A. No. [48]

(The following is cross-examination.)

Q. What did you say was done after the accident, did you say you loaded one car?

A. I think the load in question was loaded.

Q. You finished loading one load?

A. Yes, sir.

Q. How many logs would that be?

A. Well, it would vary from 20 to 25.

Q. And those likewise were dumped from the truck up on the road and rolled down?

A. Yes, sir.

Q. Did they stop on the landing west of the bunker logs? A. Not all of them.

Q. Some of them did?

A. The majority of them, yes.

Q. How did you go about loading those logs?

A. We used a log jammer, a swinging machine. We used a log jammer in loading them.

Q. How did that take the logs, this machine—the process loading, how did that take place, did

(Testimony of Harry H. Hansen.)

you hook on to the end of the log or the middle of the log?

A. We used a crotch line and we hooked hooks on each end.

Q. Those logs swung back and forth a little?

A. Yes, sir, they did.

Q. And as you loaded them on the car they would tear up the landing to some extent? [49]

A. Yes, sir, they would.

Q. They would make sort of a dip in the landing as a result of the log loading operation?

A. Just the drag of the log as you picked it up.

Q. Where you picked the logs up there on the landing the bark is rather loose?

A. Yes, sir, it is.

Q. It is soft material? A. Yes, sir.

Q. So that having done that, the condition might have been somewhat different than it was at 10 o'clock in the morning at the time of the accident?

A. Not in the general area because it was a very minor operation, just a minor happening.

Q. How far back to the west of the bunker would you determine that the landing extended, would it extend back to the slope?

A. I didn't get that question.

Q. West of the log bunker there is what you call the landing? A. Yes, sir.

Q. And is that what had bark in?

A. Yes, sir.

Q. How far did that extend back west of the bunker log?

(Testimony of Harry H. Hansen.)

A. Twenty or twenty-five feet approximately.

Q. Would it extend back to the level, the base of the slope of the hill where the logs are dumped.

A. Nearly so. [50]

Q. As I understand it you were on this log about six feet from Mr. Powell, to the north of him, how far were you north of the loading machine?

A. I would say that I was about 12 feet.

Q. Where was the loader with reference to the logs that came down off the truck to the log bunker?

A. A little bit north of that.

Q. Your loader was how long?

A. Forty feet.

Q. I think on direct testimony you said that you didn't remember which way you were facing as you sat on this log bunker?

A. That is correct.

Q. You didn't see this slab in flight?

A. That's right.

Q. When did you first see it, the slab?

A. When some one hollered, I jumped up and looked, and that instance I was facing that way, after he hollered I noticed it.

Q. About the time it struck Mr. Powell?

A. Yes, sir.

Q. So that you cannot say from which direction it came? A. Not definitely.

Q. This slab you say was about four feet long, did it consist entirely of bark?

A. No, sir. [51]

Q. There was a piece of timber in it?

(Testimony of Harry H. Hansen.)

A. Yes.

Q. How long had you been working up there in this same business?

A. Since I was 18 years old, the last few years I have been——

Q. ——Let me ask how old you are now?

A. I am thirty-two.

Q. During the time that you have been working there has it always been the practice for those working around the cars to move over to the north or in some direction when the logs are being rolled down to the bunker?

A. That is the way I did, yes, sir, that is in the general direction I would move.

Q. Why would you move at all?

A. Well, it was the customary place to sit down.

Q. Was there any other reason you went over there other than to sit down?

A. Yes, to get down out of the way of the unloading logs.

Q. Does bark or things fly off the logs as they roll down this hill?

A. Yes, some. I would say that on some it does.

Q. And was that one of the reasons why you moved over there so that you would not be struck by some bark or anything that might be flying off the logs? A. Yes, sir.

Q. In your experience up there have you ever seen a slab of this [52] type; of the type that struck Mr. Powell, have you ever seen one like that fly off the logs?

(Testimony of Harry H. Hansen.)

A. I never was present at any time that a slab that large let go.

Q. From your experience up there can you tell me, first, when these logs are cut and before they are hauled to the unloading dump, are some of them splintered sometimes?

A. Yes, I would say so.

Q. And did this slab indicate that it was splintered off a log that might have been cut in the forest?

A. I never questioned that part of it. I suppose it was, it could have been an unseen splinter there with the load.

Q. Something that developed with the cutting of the logs?

A. Yes, I would say that it had occurred that way probably. I know it could happen and it would happen lots of times, that there would be splintered logs.

Q. Ordinarily that only thing that comes off those logs would be the bark?

A. Bark and very small limbs.

Q. And this was not a limb?

A. No, it wasn't.

Q. It was bark that had some timber on it?

A. Yes, sir.

Q. I think you were not too definite as to whether there were two or three logs forming this bunker on September 15? A. That is right.

Q. It could have been just two? [53]

(Testimony of Harry H. Hansen.)

A. Yes, them logs vary in depth through there, that part of the bunker.

Q. Who put those logs in there?

A. I did.

Q. You worked for Bedal & Smith?

A. Yes, sir.

Q. What does that company do, does it haul logs for Hallack and Howard Company?

A. Yes, sir.

Q. Did you have anything to do with the cleaning out of the landing there? A. No.

Q. Was it done by your company?

A. Yes, sir.

Q. I suppose that they have been loading logs at Banks in this same fashion for a long time?

A. Yes, sir, they have.

Q. Was there anything unusual in the way that you were performing this work at the time Mr. Powell was injured.

(I assume the objection to that question was sustained.)

The Court: Yes, it was. We will take a fifteen minute recess at this time.

September 21, 1953, 3:20 P.M.

Q. Were you performing the unloading or was it being performed [54] at the time, the same as it always has been?

A. That was my first year there. That was the only year that I worked there.

(Testimony of Harry H. Hansen.)

Q. I thought you said that you were working there before? A. In this vicinity.

Q. When did you start to work at Banks?

A. My memory is around the 7th of May, 1949.

Q. During that time—let me ask this, the operation of the unloading of logs at the time Mr. Powell was injured was it the same operation that you had been performing since May, 1949, since you had been there? A. Yes, sir.

Q. During the time that you were there you had observed practically every load of logs unloaded?

A. No, sir.

Q. At least you got out of the way when they were unloading logs? A. Yes, sir.

Q. And if you had your loader down where the logs might come there would be times when your loader might be back several cars away?

A. Yes, sir.

Q. There are two tracks, the main line and immediately to the west is the loading track on which you placed cars? A. Yes, sir.

Q. And then the road to the west again that trucks pulled in [55] on and dumped—are the tracks and the road in the same location now as they were at the time of the accident and have then been in the same location since the accident?

A. Yes, sir, I think so.

Q. Do these logs come down off the trucks with quite a force when they are dumped?

A. Yes, sir.

(Testimony of Harry H. Hansen.)

Q. And after they hit the ground they roll down on the landing to the bunker logs?

A. Yes, sir.

Q. And you testified that these bunker logs were put in there to protect cars and to protect the stuff or keep it from getting on the tracks?

A. Yes, sir.

Q. And what is done to these logs after they are unloaded, before they are loaded on the cars again, are they measured and scaled? A. Yes, sir.

Q. Who did that scaling?

A. At the time we had two of them, Mr. Sage and his father.

Q. Who did they work for?

A. For the Howard & Halleck Lumber Company.

Q. Mr. Hansen, when did you become acquainted with Mr. Powell? A. About the first of June.

Q. About the first of June? A. Yes. [56]

Q. 1949? A. Yes, sir.

Q. I take it that he never talked to you about his physical condition one way or another?

A. No, sir.

Q. You just saw him performing his work?

A. Yes, sir.

Q. Whether he might have had something wrong with him or was not entirely in good health, you wouldn't know would you?

A. Well, I seen him performing his duty and from the general appearance and in my own opinion he was in good condition.

Q. That was all you had to go by was the fact that he was performing his duties?

(Testimony of Harry H. Hansen.)

A. Yes, sir.

(Redirect examination by Mr. Langroise.)

Q. You were asked about the people that were scaling, what do you mean by scaling?

A. Well, that is how they run those logs on. The railroad hauls them on this scaling and the company buys them.

Q. What do they do?

A. They measure the ends of the log.

Q. That is the function of measuring only, it is not the removing of bark or anything of that nature? A. That is right.

Q. During the time you were there from May 7 to the time of [57] the accident, had anyone cleaned any of the debris from back of the bunker logs?

A. No, sir.

Q. You were asked whether or not you moved down from where the logs were being unloaded because of a possibility that the bark or anything of that kind might fly, was there any other reason?

A. Yes, our personal safety ourselves.

Q. Is that why you moved?

A. Well, it was just the general place that we came together, that is where we waited for them to unload.

Q. You were asked why you left from where you unloaded, and you gave a reason—what that the only reason?

A. No, sir, that was away from the logs.

(Testimony of Harry H. Hansen.)

Q. Those bunkers when they were filled didn't stop the logs? A. No, sir.

(Now to page 150, the testimony of Charles Ritter.)

CHARLES RITTER

called as a witness by the defendant, after being first duly sworn testifies as follows.

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Charles Ritter.

Q. Where do you reside?

A. Banks, Idaho. [58]

Q. For whom are you employed?

A. Bedal & Smith.

Q. How long have you worked for Bedal & Smith? A. About six years.

Mr. Elam: This is covered by the stipulation and goes to all the parties.

The Court: That is right.

Q. And during that time have you worked up there? A. Yes, sir.

Q. And what is their business?

A. Logging contractors.

Q. Hauling logs from the forest to Banks?

A. Yes, sir.

Q. Do they conduct the unloading of the logs and the loading of the cars? A. Yes, sir.

Q. When these logs are brought in on the trucks

(Testimony of Charles Ritter.)

where does the truck stop to dump them so that they can be loaded on the cars?

A. Anywhere along this road.

Q. That is west of the track? A. Yes, sir.

Q. How far west of the loading track is that?

A. About sixty feet.

Q. Is it on the level with the track?

A. No, it is quite a bit higher. [59]

Q. How high is the road, how much higher than the level of the tracks?

A. I would say about twenty feet.

Q. And what was your job?

A. I was a hooker.

Q. And what does a hooker do?

A. He has to guide them hooks on to the logs to be loaded.

Q. Puts them into position?

A. Hook the end of the logs, there were two of us, one at each end.

Q. Is that for the purpose of loading the derrick—picking them up—the logs?

A. Yes, sir.

Q. You worked for six years, and I believe you were in the service a couple of years—did that include two years in the service?

A. I wasn't counting that, about eight years with that.

Q. How long had you worked for Bedal & Smith prior to the 15th of September, 1949?

A. Well, maybe—the first I believe was four years.

(Testimony of Charles Ritter.)

Q. Was the work continuous there at that time, this last time you were up there to 1949, to September, 1949? A. In the summer time.

Q. Is there a portion of the year that there is no logging operation? A. Yes, sir. [60]

Q. What portion of the year is that?

A. That is in the winter months.

Q. When did they start in the spring?

A. About the first of May.

Q. And about when did they end that work in the fall? A. About the first of December.

Q. Do you recall the accident that occurred up there on September 15, 1949?

A. Yes, sir, I do.

Q. At the time this accident occurred where were you with reference to the tracks?

A. I was west of the track.

Q. Were you on the log bunker or where?

A. I was standing beside him.

Q. Standing beside Mr. Powell?

A. Yes, sir.

Q. Was he north or south of you?

A. He was south of me.

Q. What were those bunkers that you mentioned?

A. They were the largest logs that we could find to put in there.

Q. How many were there where you were standing before the logs came down, do you know?

A. No, I don't.

(Testimony of Charles Ritter.)

Q. You, of course, saw the logs unloaded from the trucks and rolling toward the tracks?

A. Yes, sir.

Q. Where they came down toward the track, what was the condition [61] of the bunker or the landing just west of the bunker where the logs came down? A. It was pretty well filled up.

Q. Was it filled to the top of the bunker?

A. Except for a dip where we drug the logs.

Q. How large was that dip?

A. Well, maybe a foot or a foot and a half ditch there.

Q. And how wide was that place?

A. About 20 feet.

Q. About 20 feet wide? A. Yes, sir.

Q. Where was the bottom of the slope of the hill west of the track, how far?

A. That would be about 20 feet.

Q. Then, what was the nature of the slope from this 20 feet west of the track—that is, after this 20 foot space west of the track what was the nature of the slope up toward the truck, was it on an incline? A. Yes, sir, it was pretty steep.

Q. Who put the logs there—that is, the bunkers, who put them up there? A. We assisted.

Q. You mean Bedal & Smith?

A. Yes, sir.

Q. When you started out with your logging operation in the spring, what was the nature, did you have one or two or [62] how many logs.

A. We put them all in clear through.

(Testimony of Charles Ritter.)

Q. And then you added logs as you wanted any?

A. Yes, sir, unless they were left there from the year before.

Q. This landing west of the logs that extended west, you say that extended out about 20 feet?

A. Yes, sir, about that.

Q. And that did they consist of?

A. Bark and trash in there.

Q. Was it solid or soft material?

A. It was soft.

Q. And about how far west were you of the place where the logs came down off the hill to the track? A. West.

Q. No, I meant to say how far north?

A. I was about 60 feet north.

Q. Did you see—first, let me ask you, how are those logs unloaded from the trucks on the road?

A. We have a Cat with a boom on the front and they drive under and have a line that goes underneath and that is all run by a power unit.

Q. Are the logs all pushed off at once?

A. No.

Q. They are pushed off in series?

A. Yes, sir, in series.

Q. How many are—how many would be pushed off at first?

A. I would say four or five of them would fall off. [63]

Q. When did you make the next push?

A. As soon as the chains were cleared.

(Testimony of Charles Ritter.)

Q. How many pushes do you have to make to unload a load of logs?

A. That varies, but about three.

Q. At the time in question—let me ask you this—why were you over about 60 feet to the north of where there logs were coming down?

A. To be out of the way of them.

Q. Why did you go over that far?

A. We always did, I don't know why.

Q. Was it because—what happens when these logs are unloaded, do pieces fly off the logs?

A. Small pieces, yes, sir.

Q. Now, on this particular load of logs, did you see them pushed off the truck?

A. Yes, I did.

Q. Did you see them hit the ground?

A. Yes, sir.

Q. How far from the truck did they hit the ground would you say?

A. You mean down over the hill?

Q. Yes.

A. I would say about ten feet, that is, the top of the logs.

Q. How far would they drop down to the ground from where they would be on the truck?

A. Oh, that would be about twelve feet. [64]

Q. When this accident occurred was it when the first logs were being dumped?

A. I don't remember whether it was or not.

Q. Then after these logs were dumped immedi-

(Testimony of Charles Ritter.)

ately preceding this accident, what did you see, if anything, that took place there?

A. I saw the slab coming through the air.

Q. Did you see where it broke off, where the logs were, that this slab broke off of?

A. About one-half way down the hill I would say.

Q. When you saw this slab flying through the air did you holler or start to run?

A. I guess I hollered and started away.

Q. Had it struck Mr. Powell?

A. No, but it did.

Q. Did you see it strike him?

A. No, I didn't.

Q. Did you see him afterward?

A. Yes, sir.

Q. Where was he?

A. I saw him when he crawled under the car to come out on the other side.

Q. Did you pay any particular attention to this slab? A. Yes, sir, I did.

Q. What did it consist of? [65]

A. Mostly wood. It was a pretty big slab, four or five feet long and it weighed about 80 pounds.

Q. Were the operations at that time being handled and conducted, that is, the unloading of the logs and other operations there, were they any different than the work that had been performed before?

(There was an objection which was sustained.)

(Testimony of Charles Ritter.)

Q. How did you handle the logs, how did you unload them—in what manner did you unload the logs prior to the day and the time that this carload or truck load was dumped?

A. The same way.

Q. At the time this slab broke off the log had it reached the landing or the bunker?

A. No, sir.

Q. Do you know what caused the slab to break off? A. Not unless——

Q. Had you ever before seen a slab break off such as this? A. No, sir, not like this.

Q. Then from your experience in this operation up there do you have an opinion as to what caused this piece to break off this log? A. No.

Q. Do you know whether or not in cutting the log in the forest, or cutting and trimming them after they had fallen, are they sometimes splintered?

A. I believe they are sometimes splintered. I think they [66] could have been in falling or in skidding.

Q. Prior to this time what had you seen break off these logs as they were dumped?

A. I would say bark and small limbs.

Q. And would that stuff, the bark and limbs fly through the air?

A. Yes, but usually down hill with the logs.

Q. Would if fly off to the side?

A. Uusually.

(Testimony of Charles Ritter.)

(The following is cross-examination by Mr. Langroise.)

Q. Mr. Ritter, you examined this bunker and the fill back of it after the accident?

A. Yes, sir.

Q. At the point the debris and other stuff was level with the top log of the bunker?

A. Yes, sir.

Q. And the depression that you spoke of is back behind that some distance? A. Yes, sir.

Q. And sloped back to the top?

A. Yes, sir.

Q. That place where they unloaded was on the road and you say that it has an elevation of about 20 feet higher than the bunker?

A. Than the railroad track, down to the railroad level. [67]

Q. About 20 feet higher than the railroad track—how much higher from the bottom of this fill behind the bunker was the elevation to where the logs were unloaded?

A. About 50 feet, I imagine.

Q. Fifty feet back west of the bottom of the fill behind the bunker logs? A. Yes, sir.

Q. What was the elevation of this, fifty feet back. A. I would say about fourteen feet.

Q. From there on the perpendicular raise of 14 feet more, is that what you mean? A. Yes.

Q. And in that 50 feet there was a drop of fourteen feet from the road itself?

(Testimony of Charles Ritter.)

A. About that.

Q. Where was the edge of the road from which they unloaded logs with respect to this drop—to where the drop started?

A. Well, they were on the edge of the road.

Q. When they dropped they hit on down and took this 50 feet with the fourteen foot drop and out they went from the road?

A. That is right.

Q. This fill behind the bunker logs had been full for sometime before the injury to Mr. Powell?

A. That is right. [68]

Q. For some time prior thereto there had been, as the logs were unloaded, there were occasions that they were going over and hitting the cars?

A. At times.

Q. That was not uncommon for several weeks before the accident? A. That is right.

Q. You say that when they were unloading at different times limbs and other pieces of the logs and bark would fly off but they always went down?

A. Usually they went straight down.

Q. But sometimes they went out at different angles? A. Yes, sir, at times.

Q. Do you recall about how many logs was on this load? A. Probably fifteen anyway.

Q. It would depend entirely upon the size?

A. Yes, sir.

Q. Did you see these logs as they went down the hill, all of them?

(Testimony of Charles Ritter.)

A. This part that the slab came off.

Q. Did you see them going over the bunker? That is, did you see them go over the bunker and hit the train?

A. I don't know whether they went over or not.

Q. You said that you were standing there?

A. Yes, sir.

Q. You know Mr. Hansen, do you?

A. Yes, sir. [69]

Q. Did you see Mr. Hansen there?

A. Yes, sir.

Q. Where was he with respect to you?

A. I think he was the second man to my right.

Q. Being the second to the right, would that be the second to the north? A. Yes, sir.

Q. Was there someone between you and Mr. Hansen? A. Yes, Mr. Parrish.

Q. Did you see the position of Mr. Hansen?

A. I didn't pay any attention.

Q. Did you notice the position of the other man?

A. No, not particularly.

Q. You were all together there?

A. Yes, sir.

Q. You saw this slab of wood, where was this when you first saw it?

A. About half way down the bank.

Q. It had gone about half way down this 50-foot incline. Then what did you see it do?

A. I saw it break off and fly through the air.

Q. At the moment you saw it what did you do?

A. I hollered.

(Testimony of Charles Ritter.)

Q. You looked around and what did you see?

A. Mr. Powell was gone. [70]

Q. He had been there—he wasn't there any more? A. No, I didn't see it hit him.

Q. This piece weighed 75 or 80 pounds?

A. Yes, sir.

Q. It was mostly wood? A. Mostly wood.

Q. Had you, prior to the 15th of September, 1949, complained to the Agent of the Union Pacific of this being filled up behind the bunkers and being dangerous? A. I hadn't, no.

Q. And had you not complained to anyone?

A. No.

Q. Going back to this load of logs on the truck, you saw it unloaded? A. Yes, sir.

Q. Did all the logs come off at once?

A. No, sir.

Q. What did you observe?

A. About half a dozen logs.

Q. You saw them go on down?

A. Yes, sir.

Q. And did you see some more come?

A. Not after that slab flew—I didn't see any more.

Q. It was the first bunch that you observed that you saw this slab come from?

A. I would say that it was but I am not [71] sure.

Q. You would not say whether there were some logs that went down ahead of that?

A. No, I am not sure.

(Testimony of Charles Ritter.)

Q. When they rolled or came off the truck what would they do? A. They would roll.

Q. Around and around?

A. Yes, that is right.

Q. You don't recall whether there were logs ahead of this that you saw the piece come from?

A. I don't remember whether it was the first or not, it could have been the second.

Q. What time would there have been between the first and the second, if you know?

A. Well, a minute, maybe.

Q. Those logs go down there rapidly?

A. That is right.

Q. That is, when they are dumped?

A. That's right.

Q. And all of whatever bunch was dumped off went down together? A. That is right.

(Now, the redirect by Mr. Anderson.)

Q. Was there more than one slab that flew off the logs and struck Mr. Powell?

A. Just one.

Q. And that is the one that you testified to?

A. Yes, sir. [72]

(Recross by Mr. Langroise.)

Q. You didn't see that?

A. No, sir, I didn't.

Q. And you don't know the position he was in when he was hit? A. No, sir.

(Now we come to the testimony of Albert Parrish.)

ALBERT PARRISH

called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Will you state your name?

A. Albert Parrish.

Q. Where do you live? A. At Banks.

Q. By whom are you employed?

A. At the present time by the Caldwell Box Company.

Q. And who were you working for on September 15, 1949? A. Bedal & Smith.

Q. What was your job?

A. A hooker on the log landing.

Q. A hooker on the log landing?

A. Yes, sir.

Q. You had the same duties that Mr. Ritter had?

A. Yes, sir, we worked together.

Q. He worked on one end of the logs and you on the other? [73] A. That is right.

Q. Did you see the accident to Mr. Powell on September 15, 1949?

A. I saw the logs being unloaded and I saw the slab but I never saw Mr. Powell struck by the slab.

Q. Did you see the slab flying through the air, that struck Mr. Powell? A. Yes, sir.

Q. Where were the logs—let me ask this—did you see this piece break off the logs or log?

(Testimony of Albert Parrish.)

A. No, sir, I didn't. I just saw it in the air and someone hollered.

Q. Did you know which direction it came from?

A. From the west of where we were at.

Q. Do you know about how far the slab was from the log that it broke off from when you first saw it?

A. Now, I couldn't say. It didn't know which log it broke off of at that time.

Q. Did you watch the logs roll down the hill off the truck?

A. Yes, sir, we always watched them.

Q. And did you see the slab?

A. Yes, I saw the slab in the air.

Q. How close was it to the logs that were rolling down the hill?

A. Well, I couldn't say exactly, probably 10 or 12 feet from the logs when I saw it.

Q. When you saw this piece of slab flying through the air had the logs gotten down to the bunker yet? [74] A. Not all of them.

Q. How long had you been working at Banks in that occupation or capacity?

A. I started in July. I don't know the exact date but it was in the month of July. I started to work that summer.

Q. Had you watched the numerous trucks of logs unloaded there? A. Yes, sir.

Q. Where were you at the time this slab broke off the log?

(Testimony of Albert Parrish.)

A. At the time it broke off I was probably 55 or 60 feet from where the logs were coming down.

Q. To the north?

A. And then I ran 25 or 30 feet on to the north and when I saw the slab I was probably 80 feet away when the slab struck.

Q. Were you further away than Mr. Ritter and Mr. Powell? A. Yes, when I stopped I was.

Q. What did you do when you saw this slab coming through the air?

A. I tried to get out of the way.

Q. During the time that you were operating there have you seen slabs of this type break off and go through the air such as this? A. No, sir.

(The cross-examination by Mr. Langroise.)

Q. Where was that slab when you first noticed it? A. It was in the air.

Q. It was coming in what direction? [75]

A. It was—well, the logs were being unloaded to the west of the tracks and it was flying to the west (should be east).

Q. How far away from where you were?

A. At the time it was about 60 feet from where I was at that time.

Q. Did you see anyone when you saw the slab?

A. No, someone shouted a warning but I don't know who it was. Someone hollered "look out."

Q. You had been watching them unload logs before? A. Yes, sir.

(Testimony of Albert Parrish.)

Q. And was this off some of those logs that dropped off first or how were they?

A. I cannot say whether it was first or not.

Q. Do you know whether the logs had run over the bunker or hit the cars before this?

A. I don't think so.

Q. Do you know?

A. No, I cannot state for sure.

Q. It was not unusual for logs to go over the bunker and hit the cars?

A. Now and then one would go over.

Q. While you were there other material and pieces of logs did come off and fly through the air?

A. Yes, sir, some pieces.

Q. This bunker that you were on, how close was it to the railroad cars themselves?

A. About four feet from the cars. [76]

Q. From the cars themselves?

A. Yes, about three or four feet.

Q. And in some places not more than a foot?

A. They have more clearance than that, they usually set them out about four feet from the cars.

Q. You think it was about four feet?

A. Yes, sir.

Q. That is your judgment? A. Yes, sir.

Q. You didn't see this wood hit Mr. Powell?

A. No, sir.

Q. When did you see him after that?

A. When he was crawling under the car.

(Now the testimony of Mr. Sage.)

The Court: I think we will stop there. I should have said to the jury at the beginning of this reading that this is saving a great deal of time. It may sound somewhat tedious to the jury but I want to tell you that these witnesses have testified heretofore in this Court room and they are using this as depositions to give you the benefit of their testimony the same as if the witness were here on the stand testifying and you should so consider it. Court will be in recess until 10 o'clock tomorrow morning. [77]

September 22, 1953, 10 A.M.

The Court: You may proceed Mr. Anderson.

HOWARD SAGE

called as a witness by the Defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Anderson:

Q. Your name is Howard Sage?
A. Yes, sir.
Q. Where do you reside? A. At Banks.
Q. By whom are you employed?
A. Hallack & Howard Lumber Company.
Q. How long have you been employed by them?
A. Since 1944.
Q. During any of that time has any of your work been at Banks? A. Yes, sir, since 1945.
Q. And what are your duties?

(Testimony of Howard Sage.)

A. To scale these logs and determine the amount of boards that can be sawed out of them.

Q. When is this scaling done?

A. After they are unloaded from the trucks and before they are loaded on the cars.

Q. Do you recall an accident to Mr. Powell on September 15, 1949? A. Yes, sir.

Q. Where were you just prior to the time of that accident? [78]

A. I was fairly close to Mr. Powell in a group of fellows standing there.

Q. How far was that from the place that the logs would roll down the hill to the bunker?

A. I would judge about 60 feet.

Q. Why were you in that position?

A. Well, for two reasons. One was to get out of the cloud of dust that always goes up when they are dumped, and the other was to get out of the way of the logs and to be in a safe place if one decided to take a different direction.

Q. Did anything fly off those logs as they came down? A. Occasionally a piece of bark.

Q. How far is this road that the trucks come in and dumped those logs from the loading tracks?

A. I think it would be 40 or 50 feet in a horizontal distance.

Q. Would the logs be higher than the level of the tracks? A. In this case it was, yes, sir.

Q. How much higher would it be to the wheels of the truck up on the road than the level of the tracks?

(Testimony of Howard Sage.)

A. I would say it would be 20 to 25 feet.

Q. And these logs are dumped off the truck to the west and then they roll down an incline, is that right? A. Yes, sir.

Q. And of course, there is a log bunker west of the tracks? A. Yes, sir. [79]

Q. Is there a landing west of the log bunker?

A. Yes, sir, there is a place that is fairly level west of it.

Q. How wide is that level place west of the bunker? A. About 20 or maybe 18 feet.

Q. And then over there west, what is the condition of the ground is it level or otherwise?

A. It is not level, it raises at about a 45 degree angle I would say.

Q. What is on this landing?

A. Well, after loads of logs are dumped there is an accumulation of bark.

Q. Did you see this slab that struck Mr. Powell?

A. Yes, sir.

Q. Did you see it break off the log?

A. I didn't see it break off the log.

Q. Can you tell us the direction—first, did you see it coming through the air?

A. I saw it in the air.

Q. From which direction was it coming toward you? A. From the west and the south.

Q. Did you see it strike Mr. Powell?

A. Yes, sir.

Q. What did you do when you saw it coming?

(Testimony of Howard Sage.)

A. Well, I don't distinctly remember, but I imagine that I shouted and backed off a few paces.

Q. Did you see Mr. Powell afterward?

A. Yes, sir. [80]

Q. Where was he when you saw him after the accident?

A. He was crawling from under the car on the other side.

Q. From the angle that the slab came through the air could you tell me whether or not the log from which it came had reached the bunker yet?

A. No, I couldn't tell you that.

Q. The tracks there run almost directly north and south, is that right? A. That is right.

Q. And this slab would be coming from the south and the west, is that right? A. Yes, sir.

Q. I presume that you had watched this kind of unloading for a long time up there?

A. Hundreds of times, yes, sir.

Q. Had anything of this particular nature ever occurred before?

A. I have never noticed anything like this, no, sir.

Q. Had you seen anything fly off those logs before?

A. Yes, pieces of bark would be about all.

Q. I don't know, maybe I asked this, did I ask you whether you were about 60 feet north of the place where the logs came down?

A. Yes, you asked that.

Q. Do you know about how far those logs were

(Testimony of Howard Sage.)

down the hill after they had been dumped when you saw this slab coming [81] through the air?

A. About half way I would say.

Q. Then tell me about how far those logs would fall when they are pushed off the truck before they hit the ground?

A. Well, they were not all the same distance. The top would fall farther, the truck load of logs would be about 12 or 13 feet above the ground.

Q. I suppose those logs were different sizes?

A. Yes, sir.

Q. Do you have any idea of the average weight of one of them?

A. The railroad company requires us to bill them at 9 pounds to the board foot.

Q. Ordinarily how many board feet in one of those?

A. Well, that would vary up to a thousand board feet.

Q. On an average?

A. I imagine about 200 feet—200 board feet.

(Cross-examination by Mr. Langroise.)

Q. Mr. Sage, as these logs came down did you notice in this load how many had come down before Mr. Powell was hit? A. No, sir, I did not.

Q. Do you know whether some of them had hit the loaded cars?

A. No, I didn't—I don't know.

Q. You don't know whether they had or not?

(Testimony of Howard Sage.)

A. No, sir.

Q. Do you know whether some had gone down and over the bunker [82] prior to those that you noticed coming down when you saw this piece?

A. They could have, but I don't remember whether they did or not.

Q. You saw it hit Mr. Powell?

A. Yes, sir.

Q. What did you notice it do to Mr. Powell?

A. Well, Mr. Powell threw his arm up to protect his face and it knocked him from this log backwards, that is as far as I could see because I was one the opposite side of the log.

Q. What was the condition of this bunker behind—that is, whether it was filled?

A. Well, there was bark behind this, that is why the logs were there, to hold the bark back behind there.

Q. And did it fill up to the top?

A. It was fairly level with the top.

Q. And it had been full for some two weeks or thereabouts before this accident?

A. Well, I wouldn't know exactly the time, but it was some few days.

Q. The logs had been going over the bunker and hitting the cars?

A. That happened quite often.

(Redirect examination by Mr. Langroise—pardon me, that was my redirect.)

Q. Do you know whether or not the bunker was

(Testimony of Howard Sage.)

full, that is, whether it was full or not full, did some of the logs go [83] over anyhow?

A. Well, they could on account of when they get on top of the others, they sometimes get to going end-ways.

Q. Did you have control of those logs after they are dumped off the trucks?

A. No control whatever.

Q. When they are dumped they are on their own? A. That is right.

Mr. Anderson: Plaintiff rests, your Honor.

Mr. Eberle: We rest as to the Plaintiff.

Mr. Anderson: I will be glad to make a motion at this time.

The Court: I take it the matter is submitted as to the case of the Plaintiff Union Pacific Railroad Company and Hallack & Howard Lumber Company?

Mr. Anderson: That is my understanding.

The Court: The case having heretofore been tried so far as the Plaintiff in that case, Mr. Powell, and the Union Pacific Railroad Company is concerned, and the jury in this case having found negligence on the part of the Railroad Company in not furnishing a safe place for Mr. Powell to work in connection with the unloading of these logs, they held that was negligence. There being an indemnifying agreement here from Hallack & Howard Lumber Company to hold the railroad Company harmless, there is only one thing that the Court can do and that is [84] to find that the Union

Pacific Railroad Company is entitled to recover from the Hallack & Howard Lumber Company under the indemnifying contract and on account of the negligence found to have existed on the premises. The Railroad Company may present their findings and judgment in connection with that.

I will take a recess at this time for fifteen minutes and will talk with counsel about further proceedings.

September 22, 1953, 10:35 A.M.

Mr. Eberle: I understand that exhibit 2 was admitted for all purposes as to all parties, I think I am not in error as to that?

The Court: That is right, there were no restrictions as to that.

Mr. Eberle: I now offer exhibit 7 for the purpose of showing the scope of that which was adjudicated in the Powell case.

Mr. Elam: We have already stated what we would stipulate——

The Court: ——you are in another case now—we are trying the case of Hallack & Howard Lumber Company vs. Bedal, we are trying this before this jury.

Mr. Elam: We stipulated what could be read.

Mr. Eberle: I am not reading anything now, I am offering it to show the scope of that which was adjudicated and determined in this case. [85]

The Court: You are putting the transcript in for that purpose alone?

Mr. Eberle: Yes, your Honor.

Mr. Elam: We object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: It may be admitted for that purpose only.

Mr. Eberle: There is one more matter before I call Mr. Armstrong. May it be stipulated that if L. H. Anderson was sworn as a witness and in lieu of his testifying, that he would testify that in the Powell case, he at that time was counsel for the defendant and that he had charge of the litigation and that if either Bedal or his insurance carrier or anyone else on his behalf had offered to take over the defense or to assist in the same that Mr. Anderson and his client would have accepted such defense or assistance.

Mr. Elam: And also that neither Mr. Anderson nor the Railroad Company at any time called on Mr. Bedal to defend that case.

Mr. Eberle: You mean that they did not.

Mr. Elam: They did not.

The Court: It may be so stipulated.

U. R. ARMSTRONG

called as a witness for Hallack & Howard, in the case of Hallack & Howard v. Bedal, after being first duly sworn testifies as follows: [86]

Direct Examination

By Mr. Eberle:

Q. Mr. Armstrong, where do you reside?

A. Winchester, Idaho.

(Testimony of U. R. Armstrong.)

Q. Are you now employed by the Hallack & Howard Lumber Company? A. Yes, sir.

Q. In what capacity?

A. General Manager.

Q. And how long have you been so employed?

A. Thirty-nine years.

Q. During the year 1949 did you have charge of the Hallack & Howard Company operations at Cascade, Idaho? A. Yes, sir.

Q. Was it your Company that entered into a logging contract with Bedal and Smith?

A. Yes sir.

Q. Mr. Armstrong, handing you exhibit 8 marked for identification, I will ask you what that is?

A. This is a logging contract that Hallack & Howard Company had with Mr. Bedal.

Mr. Eberle: If the Court please, there is a copy in the pleadings but I would also like to offer the original.

Mr. Elam: No objection.

The Court: It may be admitted.

Mr. Eberle: There are two clauses here that I would like to read to the jury. [87]

The Court: You may do so.

Mr. Eberle: "It is further stipulated and agreed that under no circumstances is the party of the first part", (that is Hallack Howard Lumber Company) "to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract" and then again,

(Testimony of U. R. Armstrong.)

"Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liabilities and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract."

Q. Mr. Armstrong, it has been developed in the case known as Powell vs. Union Pacific Railroad Company that there were certain bunkers and log landing at Banks, Idaho, do you know who put those in?

A. The logging contractor, Mr. Bedal.

Q. Did you have anything to do with the installation of those log bunkers?

A. No, we didn't.

Q. In exhibit 8 there is reference to a Banks landing, you are familiar with those premises?

A. Yes, I am.

Q. Are you also familiar with the premises under lease at that time from the Union Pacific Railroad Company? [88-89]

A. Yes, I am.

Q. Are these properties identical?

A. I don't understand your question.

Q. With reference to the Banks Log Landing and the leased premises?

A. Oh, yes, they are.

Q. In 1949 and in the carrying out of this logging contract that you have just testified to did Hallack & Howard Lumber Company have anything to do with

(Testimony of U. R. Armstrong.)

the loading or unloading of logs at the banks landing? A. No, sir.

Q. Who had the function of loading and unloading?

A. Our contractor Mr. Bedal.

Q. What employees, if any, did you have at Banks, Idaho, or at the Banks Landing in September, 1949?

A. As I recall we only had two employees there, scalers, log scalers.

Q. Did they have any function to perform other than scaling the logs? A. No, sir.

Q. Who cut the logs in the forest?

A. Our contractor, Mr. Bedal.

Q. You mean the defendant here, Bedal?

A. Yes, sir.

Q. Who loaded those logs on the trucks and brought them to the log landing at Banks, Idaho? [90]

A. Our contractor Mr. Bedal.

Q. Did Hallack & Howard Lumber Company take any part in the loading or the unloading of the logs at the Banks landing in 1949, in September 1949? A. No, sir.

Q. Did you employ any of the men working there? A. No, sir.

Q. Did you have anything to do with the employees of the logging contractor, the third party defendant, Bedal? A. No, sir.

Q. Did the Hallack & Howard Lumber Company have anything to do with the logging operation at

(Testimony of U. R. Armstrong.)

Banks in September 1949? A. No, sir.

Mr. Eberle: You may inquire.

Cross-Examination

By Mr. Elam:

Q. This Banks landing that you referred to that consisted of this roadway along on top of this elevation? A. Yes, sir.

Q. And the hill to roll down and the bunker?

A. Yes, sir.

Q. That road was there at the time you entered into this contract? A. Yes, sir.

Q. And was there as a part of what is called the landing? A. Yes, sir.

Q. And that road was for the purpose driving trucks up and [91] unloading at the top of the grade? A. Yes, sir.

Q. That had been there for a long time before this contract was entered into?

A. Yes, sir.

Q. And had been used for that same purpose?

Mr. Eberle: We object to that as incompetent, irrelevant and immaterial and not proper cross-examination, and it is not within the issues.

The Court: It is immaterial for two reasons,—it doesn't make any difference how long it had been used, the entire question is, was the use of it negligent. It is not proper cross-examination. Objection sustained.

(Testimony of U. R. Armstrong.)

Q. And there was no other road there from which to unload these logs?

Mr. Eberle: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained, there is no other landing in question except where these logs were unloaded.

Q. Now, as to your employees, you say that you had two scaling employees? A. Yes, sir.

Q. They worked there at the landing?

A. Yes.

Q. The manner of unloading the logs you heard described here? A. Yes sir. [92]

Q. Is that the customary and the ordinary way for unloading the logs?

The Court: Mr. Elam, I have ruled on that question several times. It doesn't make any difference what the customary way of unloading the logs was, it is a question of whether it was negligent to unload them as they did.

Q. You were not there at the time the accident happened? A. No.

Mr. Elam. That's all.

Mr. Eberle: That's all. We rest your Honor.

The Court: I take it that it is understood that all of the evidence introduced in the trial of the case of Union Pacific Railroad Company vs. Hallack & Howard Lumber Company was introduced in your behalf as against the defendant Bedal.

Mr. Elam: No, your Honor, the Powell evidence was not introduced as against this defendant.

The Court: No, not the Powell evidence but the other witnesses, and that evidence is before the jury and does not need to be repeated.

Mr. Elam: That is correct.

The Court: The jury may retire a few minutes. Now, Mr. Elam do you desire to make a motion.

(In the absence of the jury.)

Mr. Elam: Comes now the third party defendant at the close of the evidence introduced by the third party [93] Plaintiff and as to each count of the third party complaint moves the Court to dismiss the third party Plaintiff's action and to direct the jury to return a verdict in favor of the third party defendant upon the following grounds and for the following reasons:

1. That the Third Party Plaintiff's evidence is wholly insufficient to warrant a recovery by it upon the facts and upon the facts and the law the third party Plaintiff has shown no right to relief.

2. That there is no evidence whatsoever to establish negligence on the part of the Third Party Defendant; that the evidence proves the following facts:

(a) That the logs were delivered in the regular manner at the place designated by the Third Party Plaintiff.

(b) That the logs were unloaded in the regular and accustomed manner.

(c) That the men below, including Powell, knew that logs were being unloaded at the time of the alleged accident.

(d) That the men below know that they must watch to avoid the logs and the debris flying from the logs.

(e) That is was not unusual for logs to split and pieces to come off.

(f) That the logs in falling, spinning and whirling would throw pieces therefrom.

(g) That the evidence shows that the splinter or slab came off the log while it was half way up the incline and before it reached the bunker or the level place or space just west of the bunker.

(h) That this was an unavoidable accident.

(i) That there is no evidence whatsoever to show that the unloading of the logs was other than used in the unloading of other logs and there is no evidence to show that the unloading itself was of any negligent nature.

(j) That the evidence shows that if there was any negligence on the part of Bedal, there was contributory negligence on the part of Powell which contributed to and was the proximate cause of the accident.

(k) That the evidence introduced herein proves that the obligation of Hallack & Howard was under a specific indemnity agreement as provided in their lease, that there is no such indemnity agreement as

between Hallack & Howard and the third party defendant.

3. That the contract between third party plaintiff and third party defendant is a written contract, which according to its terms is not a contract of indemnity, that the interpretation of this contract is a matter of law and that this contract does not impose on the third party defendant any agreement or contract for indemnity or guaranty in connection with the facts and the pleadings herein. [95]

The Court: I am going to overrule the motion but in overruling the motion I want it understood that I am not finally passing on the one question as to whether this is an indemnifying contract or not. I have heretofore ruled that it wasn't an indemnifying contract, without prejudice and I am still holding that matter open.

(The following in the presence of the jury.)

The Court: You are excused until 2 this afternoon, and we will recess at this time until 2 p.m.

September 22, 1953

Mr. Elam: Under the agreement between the attorneys under which the testimony of Mr. Hansen, Mr. Ritter, Mr. Parish and Mr. Sage was offered and read into the record, we are taking that as our evidence now, and we have no further evidence to introduce. We rest.

The Court: The jury may retire and you may be excused until 10 o'clock tomorrow morning.

(The following in the absence of the jury.)

Mr. Eberle: Comes now the defendant and third party Plaintiff Hallack & Howard Lumber Company, at the close of the evidence, all parties having rested, and moves the Court for judgment in its favor and against W. O. Bedal in the amount of the judgment entered or to be entered in favor of the Union Pacific Railroad [96] Company and the Oregon Short Line Railroad Company, and to direct the jury to return a verdict in such amount in favor of Hallack & Howard Lumber Company and against the said W. O. Bedal, for the following reasons:

1. The negligence of Bedal was the sole, primary, active, efficient and proximate cause of the injury and damge to Powell resulting in the judgment against the railroad company and in turn against Hallack & Howard Lumber Company.

2. That such negligence and the tort involved was committed solely by Bedal and was adjudicated in the Powell action and the judgment against the railroad company as well as the judgment against Hallack & Howard Lumber Company here could not exist without such determination, hence, as a matter of law in this case, such judgment necessarily determined that the act of negligence of Bedal was such sole, active, primary and proximate cause of the damage that resulted. Bedal had notice of the Powell case and an opportunity to defend and so likewise in the current case and so is bound by the orders, instructions and judgment in the Powell case.

This Court, in the Powell case, held that whether the operation of Bedal in allowing logs to be sent down the steep incline was negligence was a question for the jury, and the verdict pursuant thereto is conclusive as to Bedal's negligence. It is not of consequence that Powell did not sue Bedal in the first instance, nor that [97] Bedal could have tendered defenses not available to either the railroad company or Hallack & Howard Lumber Company because Bedal, by reason of his negligence, was not only liable to the person directly injured as a result of such negligence but also accountable to Hallack & Howard Lumber Company which has been compelled or will be compelled to respond in damage for such wrong. The record is clear, only one tort is involved and that the same was committed solely by Bedal as an independent contractor and the judgment in the Powell case necessarily adjudicated such negligence and the amount of the damage sustained, and any judgment rendered against Hallack & Howard Lumber Company must necessarily be recovered from Bedal as such tort-feasor. The defenses set forth in the answer of the third party defendant which Bedal contends could have been set up had he been sued directly is immaterial in this case because the right of Hallack & Howard Lumber Company to recover from Bedal here is a different and independent right resting upon the principle that everyone is responsible for the consequences of his own wrong and if another has been compelled to pay such damage which the wrongdoer should have paid, the latter is liable to the former. As a matter of law Powell was not guilty of contrib-

utory negligence, there were no contractual relation between Powell or Bedal, nor was there the relationship of Master and Servant. There is no evidence that the danger imminent that no reasonably prudent person would have been where he was at the time of the accident. Bedal cannot raise in this action any question as to the negligence of Powell, which as a matter of law was settled in the Powell case. Bedal cannot deny here the facts upon which the judgment in the Powell case depends and without which it could not have existed. There could be no defense made here that there may have been a different rule as to the railroad company in the Powell case which might not have been applicable to Bedal had he been defending, because Hallack & Howard Lumber Company assert here a right of recovery on an independent duty and only owed by Bedal to Hallack & Howard Lumber Company and to deprive Hallack & Howard Lumber Company the right to recover against the wrongdoer would result in the unjust inrichment of the debtor and how or in what manner Hallack & Howard Lumber Company may be compelled to pay for the wrong of Bedal is immaterial here because the only question is, was it compelled to pay on account of a tort committed by Bedal.

The Court: I would like to hear from you on this motion providing you have any authorities.

(Remarks of Court and Counsel reported but not transcribed.)

The Court. I am inclined to grant this motion, however, I will take it under advisement until ten o'clock tomorrow morning. [99]

September 23, 1953—10 A. M.

The Court: I will review for a moment the steps leading up to the decision I am about to make.

On October 13, 1950, one A. M. Powell as Plaintiff filed suit against the Union Pacific Railroad Company under an Act of Congress, which among other things provided that Railroad Companies were required to furnish their employees with a safe place to work. In that action it was alleged that the Plaintiff in that action, Powell was employed by the Union Pacific Railroad Company near Banks, Idaho, at which place there was a loading bunker for the purpose of loading logs on defendant Union Pacific's railroad cars. While he was employed at that place, logs were being rolled down an incline in a hazardous and dangerous manner which the Union Pacific knew or in the exercise of reasonable care could and should have known, and this was a violation of the Statute which required the Railroad Company to furnish the said Powell with a safe place in which to work. The case was tried before a jury and the jury held that the manner of handling the logs was negligent and returned a verdict against the Union Pacific for $15,000.00. Judgment was entered on this verdict on March 2, 1951, in which it was ordered, adjudged and decreed that Powell recover from the Union

Pacifiic the sum of $15,000.00 with interest at the rate of six per cent per annum, and costs. [100]

Motion was made by the Union Pacific for judgment nothwithstanding the verdict—this was denied by this Court. The Court finding that according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were being loaded on the train. A Cat and Boom were used and a line placed under the logs and they were pushed off the truck and down a steep incline, a distance of some twenty or more feet, the incline was so steep that they fell through the air for a distance of some twelve feet before they hit the ground and then rolled on the balance of the distance to the bunker. The slab that caused the injury to Powell broke off one of these logs and was thrown through the air and no doubt was caused to break from the log because of the force of the drop.

The operation of driving these trucks to the top of this steep embankment and the pushing of the logs off the truck and allowing them to descend this steep incline to the track was negligence—this was a question for the jury and on that ground the Court denied the motion. An appeal was later taken, which however, was dismissed after a compromise settlement. The Union Pacific made payment to Powell of $14,500.00 on December 15, 1951. At the time this accident occurred the land upon which it occurred belonged to the Union Pacific Railroad Company [101] and was leased to the

Plaintiff in this action, the Hallack & Howard Lumber Company. Under this lease, the Hallack & Howard Lumber Company agreed to hold harmless the Union Pacific Railroad Company and the leased premises from any and all liens, fines, damages, penalties, forfeitures and judgments in any manner accruing by reason of the use or occupancy of the premises by the lessee. This lease and agreement was in full force and effect at the time and place of the injury of said A. M. Powell. The injury to said Powell was caused by the use and occupation of the leased premises and the unloading of the logs thereon by the Hallack & Howard Lumber Company who had exclusive jurisdiction over the unloading of the logs thereon, and this Court has held that it was the duty of the defendant Hallack & Howard Lumber Company to assume and pay for all the injuries and damages that the Union Pacific Railroad Company has been required to pay for the injuries and damages sustained by A. M. Powell.

In the matter that I am to decide, the Hallack & Howard Lumber Company entered into a contract with the third party defendant, W. O. Bedal, in which W. O. Bedal agreed to cut and load the logs in question upon the railroad cars in Banks, Idaho, and under the terms and conditions of said logging contract it was stipulated and agreed as follows, and I quote from the contract: "it [102] is further stipulated and agreed that under no circumstances or conditions is the party of the first part to become liable for any claims whatsoever which may be in-

curred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement." The part of this that is so outstanding is "that the second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract."

Under the terms and provisions of this contract W. O. Bedal was an independent contractor and had charge and control of the premises in question here which was leased by the Union Pacific to Hallack and Howard Lumber Company and it was while the Third party defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises under the terms and conditions of the logging contract between him and the Hallack & Howard Lumber Company that the said Powell was injured. In addition to the [103] contract itself, under the rule of equity, if the third party Defendant W. O. Bedal was negligent in the unloading of the logs which caused the injury to the

said Powell and his negligence caused the injury to the said Powell under the circumstances here, an implied contract of indemnity also arises in favor of the Hallack & Howard Lumber Company as it has been exposed to this litigation and compelled to pay damages on account of the negligence of Bedal. This right of indemnity is based upon the premise that everyone is responsible for his own negligence, and if another has been compelled by the judgment of a court having jurisdiction, to pay the damages which ought to have been paid by the wrongdoer, that it may be recovered by him. Bedal's position throughout the entire pendency of this matter has been one of not seeming to care. The answer filed by him has admitted that on or about the 13th day of April, 1950, by an instrument in writing, the said A. M. Powell notified the defendant and third party Plaintiff the Hallack & Howard Lumber Company of his claim against the Union Pacific Railroad Company, and his claim against the Hallack & Howard Lumber Company arising out of the facts set forth in the third party complaint. W. O. Bedal has also admitted that on or about the 25th day of April, 1950, the defendant and third party Plaintiff Hallack & Howard Lumber Company by letter notified W. O. Bedal, third party Defendant that it had received a written claim from A. M. Powell, and at that time [104] forwarded to said W. O. Bedal a copy of the claim served by A. M. Powell. W. O. Bedal has also admitted that on or about January 10, 1951, the defendant and third party Plaintiff, Hallack &

Howard Lumber Company, in writing, by registered mail, notified said W. O. Bedal, the third party defendant of the filing of said complaint by the said A. M. Powell and inclosed therewith a copy of the complaint filed by A. M. Powell, and at that time and in that manner notified the said W. O. Bedal, among other things as follows: "This letter is to advise you that the Hallack & Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack & Howard Lumber Company from any liability whatsoever in this matter." All of which more fully appears from a copy of that certain letter from attorneys for the defendant and third party Plaintiffs Phelps & Phelps, Denver, Colorado, who at that time were acting for the Hallack & Howard Lumber Company, a copy of which letter is attached to the third party complaint on file herein. W. O. Bedal has also admitted that the third party defendant W. O. Bedal failed and refused to defend the action of A. M. Powell against the Union Pacific Railroad Company, and refused to pay the claim of said A. M. Powell, and has failed and refused to hold this third party Plaintiff, Hallack & Howard Lumber Company, harmless. [105]

Had it not been for the Act of Congress known as the Railroad Employees Liability Act, this action originally no doubt, would not have been filed against the Union Pacific Railroad Company, it would probably have been filed directly against W. O. Bedal the independent contractor who caused the injury. His conduct, in view of the fact that

he was the acting party throughout this entire case although it isn't a case of estoppel under the law, it is a case of equity or equitable estoppel at lease, because he sat idly by and let the party whom he was doing the work for, the Hallack & Howard Lumber Company become liable here. The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company, and they are the ones who were responsible to the Railroad Company and the Railroad Company was liable and the jury in the case that was tried heretofore found that this was an act of negligence and brought in a verdict against the Union Pacific Railroad Company. Should W. O. Bedal after all these proceedings be allowed to gamble on another jury's verdict which may be different from the jury's verdict already returned in this Court. The first jury found that it was negligence to drop these logs off and let them roll down this hill unrestrained as they were, which caused the slab to break off, which injured Powell. It would be a mockery on [106] justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another adjudication.

This has been a very difficult matter for the Court, I felt that in rendering judgment of $18,-334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Com-

pany and I found it necessary under the law to do that, and I now find it necessary under the law to instruct this jury that I having found in my judgment that the Hallack & Howard Lumber Company was liable to the Union Pacific Railroad Company for $18,334.15 that I will instruct you as a matter of law to bring in a verdict in favor of the Hallack & Howard Lumber Company and against W. O. Bedal, for the sum of $18,334.15, that is the amount found due from Hallack and Howard Lumber Company to the Union Pacific Railroad Company, by this Court.

Mr. Chase, I will appoint you as foreman of this jury, you may sign the verdict handed to you.

Sometimes it is necessary for the Court to assume the responsibility in a case of this kind and I felt that it would be an idle procedure for me to send the jury out and then if your verdict was not in accordance with [107] my way of thinking, I would have to change.

The Clerk may file the verdict and Court will be in recess. [108]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court for the District of Idaho, and

I certify that I took the proceedings and evidence had and given in and about the trial of the above-entitled cause, in shorthand, and thereafter transcribed the same into longhand (Typing) and

I further certify that the foregoing transcript

consisting of pages numbered to page 108 is a true and correct transcript of the evidence given and the proceedings had at the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 6th day of January, 1954.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed January 7, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to wit:

1. Complaint.
2. Summons with returns attached.
3. Motion to Dismiss.
4. Stipulation filed Oct. 28, 1952.
5. Minutes of the Court of Nov. 14, 1952.
6. Motion and Order to Bring in Third Party Defendant.
7. Affidavit of Mailing.
8. Summons with returns attached.

9. Motion to Dismiss Original Complaint.
10. Motion for More Definite Statement.
11. Motion to Strike.
12. Motion to Dismiss.
13. Stipulation filed Feb. 27, 1953, and Order attached.
14. Amendment to Third-Party Complaint.
15. Stipulation filed Apr. 7, 1953.
16. Minutes of the Court of April 8, 1953.
17. Order Denying Motions to Dismiss, etc.
18. Order Denying Motions of Deft. and 3rd Party Defendant.
19. Stipulation filed July 29, 1953.
20. Answer of Defendant and 3rd Party Plff. to Plff.'s Complaint.
21. Answer of 3rd Party Deft. to Plff's Complaint, etc.
22. Request for a Jury.
23. Request for Admission (with exhibits—No. 3).
24. Motion to Strike.
25. Answer of W. O. Bedal to Request for Admission (with exhibits—No. 4).
26. Motions to Strike from Answer of W. O. Bedal.
27. Stipulation filed September 15, 1953.
28. Minutes of the Court of September 15, 1953.
29. Order Overruling Motion to Strike.
30. Minutes of the Court of September 21, 1953.
31. Findings of Fact and Conclusions of Law.
32. Objections to Findings and Conclusions.
33. Minutes of the Court of September 22, 1953.
34. Judgment dated September 22, 1953.

35. Order Staying Execution.
36. Verdict
37. Minutes of the Court of September 23, 1953.
38. Judgment dated September 23, 1953.
39. Notice of Taxation of Costs.
40. Memorandum of Costs and Disbursements.
41. Notice to tax costs.
42. Plaintiff's Memorandum of Costs and Disbursements.
43. Motion to Amend Findings.
44. Motion to Amend Findings of Fact.
45. Notice of Appeal (Hallack and Howard Lumber Co.).
46. Bond on Appeal.
47. Designation of Contents of Record on Appeal.
48. Notice of Appeal (O.S.L. R.R. Co.).
49. Designation of Contents of Record on Appeal.
50. Bond on Appeal.
51. Supersedeas Bond.
52. Order Extending Time.
53. Transcript of Testimony.
54. Exhibits Nos. 1 to 8 inclusive.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 8th day of January, 1954.

[Seal] ED. M. BRYAN,
Clerk;

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 14197. United States Court of Appeals for the Ninth Circuit. W. O. Bedal, Appellant, vs. The Hallack and Howard Lumber Company, a corporation, Appellees. W. O. Bedal, Appellant, vs. Oregon Short Line Railroad Company, a corporation and Union Pacific Railroad Company, a corporation, Appellees. Transcript of Record. Appeals from the United States District Court for the District of Idaho.

Filed: January 11, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between plaintiffs, defendant and third-party plaintiff, and third-party defendant, through their respective attorneys, that in this action where there has been an appeal from the judgment of the Oregon Short Line Railroad Company and Union Pacific Railroad Company against the defendant Hallack and Howard Lumber Company, and also an appeal from the judgment in favor of Hallack and Howard Lumber Company and against W. O. Bedal, one transcript may be used on both appeals, and further that there need be only one printed record herein, which said printed record will be used for both appeals.

Dated: January 15, 1954.

/s/ L. H. ANDERSON,
/s/ E. H. CASTERLIN,
/s/ E. C. PHOENIX,
Attorneys for Plaintiffs.

/s/ OSCAR W. WORTHWINE,
/s/ J. L. EBERLE,
Attorneys for Defendant and Third-Party Plaintiff.

/s/ FRED M. TAYLOR,
/s/ LAUREL E. ELAM,
/s/ CARL A. BURKE,
Attorneys for Third-Party Defendant.

[Endorsed]: Filed January 21, 1954, U.S.C.A.

United States Court of Appeals
for the Ninth Circuit

No. 14,197

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation, and

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation,

Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Comes Now the appellant and pursuant to Rule 17 (6) of the Rules of the above-entitled Court does hereby set forth the points on which he intends to rely on appeal as follows, to wit:

I.

The the Court erred in denying the motion of third party defendant to dismiss the third party complaint.

II.

That the Court erred in sustaining and granting the motion of third party plaintiff for a directed verdict.

III.

That the Court erred in its Findings of Fact and Conclusions of Law in the following particulars:

(1) In making the following Finding of Fact:

"That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's injuries was that of the defendant, The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to."

(2) In making that portion the following Conclusion of Law:

"or independent of said lease."

IV.

That the Court erred in sustaining the motion of Union Pacific Railroad Company to strike the separate defenses of third party defendant.

V.

That the Court erred in rendering judgment to Union Pacific Railroad Company.

VI.

That the Court erred in rendering a judgment in favor of third party plaintiff.

VII.

That the Court erred in ruling on objections to evidence as appears from the transcript of the record.

VIII.

That the Court erred in entering an Order bringing in appellant as third party defendant.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Appellant.

Affidavit of mailing attached.

Service of copy acknowledged.

[Endorsed]: Filed January 25, 1954.

United States Court of Appeals
for the Ninth Circuit

No. 14,197

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation, and UNION PACIFIC RAILROAD COMPANY, a Corporation, and

THE HALLACK & HOWARD LUMBER COMPANY, a Corporation,

Appellees.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States Court of Appeals Ninth Circuit:

W. O. Bedal, appellant to the United States Court of Appeals for the Ninth Circuit, in compliance with Rule 17 (6), hereby designates for inclosure in the record on appeal all of the records, proceedings and evidence in the above-entitled case.

Without restricting the foregoing there is hereby designated for enclosure in the record on appeal all the matters referred to in Rule 75 (g) of the Rules of Civil Procedure, a complete Reporter's Transcript of all proceedings, including but not restricted to evidence offered and received, Exhibits

offered and received, and all papers and proceedings to the end that there shall be included therein the complete record of all the evidence and proceedings in the above-entitled case.

Dated: January 22, 1954.

/s/ LAUREL E. ELAM,

/s/ CARL A. BURKE,

/s/ FRED M. TAYLOR,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 25, 1954.

No. 14,197

United States Court of Appeals
For the Ninth Circuit

W. O. BEDAL,
Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,
Appellee;

and

W. O. BEDAL,
Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Appeals from the United States District Court for the District of Idaho.

OPENING BRIEF FOR APPELLANT.

ELAM & BURKE,
FRED M. TAYLOR,
Idaho Building, Boise, Idaho,
Attorneys for Appellant

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,197

United States Court of Appeals
For the Ninth Circuit

W. O. BEDAL,
Appellant,
vs.
THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,
Appellee;
and
W. O. BEDAL,
Appellant,
vs.
OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Appeals from the United States District Court for the District of Idaho.

OPENING BRIEF FOR APPELLANT.

JURISDICTION.

On October 3, 1952, the Oregon Short Line Railroad Company, a corporation, and the Union Pacific Railway Company, a corporation, commenced this ac-

tion against The Hallack and Howard Lumber Company, a corporation. The plaintiffs alleged in paragraph I of their complaint that each of them were corporations organized and existing under the laws of the State of Utah. Plaintiffs also alleged that The Hallack and Howard Lumber Company was a Colorado corporation. Further, paragraph I stated that the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. (R. 3.)

The defendant, The Hallack and Howard Lumber Company admitted in paragraph I of its answer to plaintiffs' complaint, that the plaintiffs were corporations organized and existing under the laws of the State of Utah; that The Hallack and Howard Lumber Company was a corporation organized and existing under the laws of the State of Colorado, and that the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. (R. 68.) By these admissions the District Court for the State of Idaho had original jurisdiction of the civil action contained in plaintiffs' complaint since the action was between citizens of different States, and the matter in controversy exceeded, exclusive of interest and costs, the sum of $3000.00. Jurisdiction existed under Title 28, U.S.C.A. 1332.

On August 31, 1952, the defendant, The Hallack and Howard Lumber Company asked the trial court for leave to make W. O. Bedal, a citizen and resident of the State of Idaho, a party to this action, and asked that a summons and third party complaint be served on him. (R. 17.) The court by an order

dated November 14, 1952, made W. O. Bedal a third party defendant to the action. (R. 18.) The defendant, The Hallack and Howard Lumber Company brought in the third party defendant, W. O. Bedal, under authority of Rule 14 A of the Federal Rules of Civil Procedure.

The third party defendant, W. O. Bedal answered the complaint of the plaintiffs and the third party complaint of The Hallack and Howard Lumber Company on August 27, 1953. (R. 72.) In paragraph I of W. O. Bedal's answer to the complaint of the plaintiffs, the plaintiffs' allegations that they were corporations organized and existing under the laws of the State of Utah; that the defendant, The Hallack and Howard Lumber Company was a corporation organized and existing under the laws of the State of Colorado, and that the matter in controversy between them exceeded, exclusive of interest and costs, the sum of $3000.00, were admitted. (R. 72.)

The case of the Oregon Short Line Railroad Company, et al., plaintiffs, v. The Hallack and Howard Lumber Company, defendant, came on for trial before the Court and the case of The Hallack and Howard Lumber Company, defendant, and third party plaintiff, v. W. O. Bedal, third party defendant, came on for trial before the court and jury on September 21, 1953, with Honorable Chase A. Clark, Judge of the United States District Court, in and for the State of Idaho, presiding.

On September 22, 1953, a judgment against The Hallack and Howard Lumber Company in favor of

the plaintiffs was entered and filed in the amount of $18,334.15. (R. 104.) On September 23, 1953, the Honorable Chase A. Clark granted the third party plaintiff's motion for a directed verdict and on the same date the jury returned a verdict according to such direction in favor of The Hallack and Howard Lumber Company and assessed damages against W. O. Bedal in the sum of $18,334.15. (R. 105, 245.) On September 23, 1953, the lower court entered judgment, and judgment was filed against W. O. Bedal, and in favor of the third party plaintiff, The Hallack and Howard Lumber Company, in the sum of $18,334.15. (R. 107.)

On October 20, 1953, appellant filed with the trial Court a notice of appeal from the judgment entered in favor of The Hallack and Howard Lumber Company, and from that order of the United States District Court granting the third party plaintiff's motion for a directed verdict. (R. 114.) Also on October 20, 1953, third party defendant, W. O. Bedal, appealed from the judgment entered in favor of the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, and against the defendant and third party plaintiff, The Hallack and Howard Lumber Company, and also from the Findings of Fact and Conclusions of Law filed in support of the judgment. (R. 117.)

In a stipulation dated January 15, 1954, and filed with the Court of Appeals on January 21, 1954, entered into by and between the counsel for all of the respective parties to this action, it was agreed that

in both the appeal from the judgment in favor of the plaintiffs, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and the appeal from the judgment in favor of The Hallack and Howard Lumber Company against W. O. Bedal, that one transcript and one printed record could be used. The jurisdiction of this Court to hear both appeals is based upon 28 U.S.C.A., 1291, 1294, 2107, and Federal Rules of Civil Procedure, Rule 73.

STATEMENT OF FACTS.

The defendant appellant in this case is W. O. Bedal. W. O. Bedal was brought in as a defendant by way of a third party complaint filed by The Hallack and Howard Lumber Company. Originally the plaintiffs, the Oregon Short Line Railroad Company and the Union Pacific Railroad Company filed a complaint against The Hallack and Howard Lumber Company seeking damages in the amount of $17,001.98, together with interest from December 15, 1951. In their complaint against The Hallack and Howard Lumber Company, the plaintiffs allege that on March 3, 1944, the plaintiffs, as lessor, leased certain ground to The Hallack and Howard Lumber Company as lessee, which property is located near Banks, Idaho. (R. 3, 4.) Plaintiffs, hereinafter called the "Railroads", alleged that in this lease The Hallack and Howard Lumber Company agreed to hold the Railroads harmless from any lien, fine, damages, penalties, forfeitures or judgments in any manner accruing "by reason of

the use or occupation of said premises by the lessee; and that the lessee shall at all times protect the lessor and the leased premises from all injury, damage, or loss by reason of the occupation of the leased premises by the lessee, or from any cause whatsoever growing out of said lessee's use thereof."

The Railroads then allege that on September 15, 1949, a certain A. M. Powell, an employee of the Union Pacific Railroad Company, was injured while the defendant, or its agents, servants or employees were loading logs onto the leased premises. (R. 4.) The Railroad gave notice to the defendant, The Hallack and Howard Lumber Co., of Powell's action against the Railroad, and tendered the defense of the action to it. (R. 5, 70.) On March 2, 1951, a jury returned a verdict in favor of Powell in the amount of $15,000.00, together with costs in the amount of $92.26, the total of which was compromised on December 15, 1951, for $14,500.00, and that judgment was satisfied by the Railroad. (R. 135, 151.) The Railroads' complaint then alleges that the injury to Powell resulted from the use and occupation of the leased premises and that The Hallack and Howard Lumber Company should indemnify the Railroad Company by reason of the indemnity provision in such lease. (R. 4.) It was alleged also in the complaint against the Lumber Company that the Lumber Company was liable by reason of the lease agreement, or independent of the lease agreement. (R. 7.) Nowhere in the complaint is it alleged specifically that The Hallack and Howard

Lumber Company was liable because of any negligence.

After suit was brought against The Hallack and Howard Lumber Company, hereinafter referred to as the "Lumber Company" it filed a third party complaint by leave of Court against W. O. Bedal. (R. 19.) In its third party complaint it alleges that W. O. Bedal, hereinafter called "Bedal", was unloading the logs on the day that Powell was injured, which was September 14, 1949. The Lumber Company further stated in its complaint that Bedal was an independent contractor, and agreed to haul logs for the Lumber Company, unload them at the Banks site, and load them on to the railroad cars. It is claimed by the Lumber Company that Bedal is primarily responsible for the injuries that occurred to Powell, and thus responsible ultimately for the damages sustained by the Lumber Company by reason of the judgment entered against it in behalf of the Railroad. The Lumber Company in its complaint also stated that Bedal was liable by reason of a written indemnity agreement contained in Bedal's logging contract. (R. 20, 21.) A copy of the logging contract was attached to the complaint, as Exhibit "D" together with certain amendments. (R. 27, 48.)

The Lumber Company also alleges in its complaint that it advised Bedal of the action by the Railroad against the Lumber Company in a letter dated October 14, 1952, which was attached to the complaint and introduced in evidence at the trial as

Exhibit "E". (R. 49.) This letter advised Bedal that the *Railroads* had commenced an action against the Lumber Company and that the Lumber Company looked to Bedal to hold it harmless. In this letter the Lumber Company asked Bedal to appear and defend the action against it in the United States District Court. This notice was given, the Court should remember, with regard to the *present* action between the Railroad and the Lumber Company.

In another letter attached to the complaint against Bedal, Exhibit "F" (R. 52), and dated January 10, 1951, an authorized agent of the Lumber Company notified Bedal that Powell had filed a complaint against the Union Pacific Railroad Company, asking for damages in the sum of $45,000.00. The letter advised Bedal that the Lumber Company would look to Bedal and his insurance carrier to hold the Lumber Company harmless from any liability that might attach to it by reason of Powell's filing a complaint against the Union Pacific Railroad Company. The Court will note that in this letter (Exhibit "F"), the Lumber Company did not tender the defense of the action by Powell against the Union Pacific Railroad Company to Bedal, nor did it ask Bedal to intervene in that case and protect the interest of either the Railroad or the Lumber Company. Exhibit "F" was attached to the Lumber Company's complaint by amendment on April 1, 1953. (R. 61, 64.)

Bedal admitted in his answer that the lease between the Lumber Company and the Railroad was a true

copy, and that on September 15, 1949, the lease agreement was in full force and effect. (R. 72, 73.) In answer to the Lumber Company's complaint Bedal admitted that he was an independent contractor. (R. 75.) Bedal also admitted that he or his agents were unloading logs at Banks, under a logging contract, and that a piece of timber broke off a log and struck Powell, an employee of the Union Pacific Railroad Company, and alleged the fact to be that this accident did not occur by reason of any negligence whatsoever on the part of Bedal. (R. 75, 76.)

Prior to the trial of the case the Railroads moved to strike the special and affirmative defenses of Bedal to their complaint. (R. 84.) The Lumber Company made a similar motion. (R. 86.) The trial Court sustained the Railroad's motion to strike the affirmative defenses of the answer of Bedal to the Railroad's complaint, (R. 89) but the motion of the Lumber Company to strike the affirmative defense was denied without prejudice. (R. 89.)

It was stipulated by and between all of the parties at the trial of the two cases that in lieu of producing personally certain witnesses that the testimony of Harry M. Hansen, Charles Ritter, Albert Parrish, and Howard Sage, whose testimony appears in the case of A. M. Powell, plaintiff, v. Union Pacific Railroad Company, defendant (Case 2776), be admitted into the record of the present actions.

The Railroads' case against the Lumber Company was tried before the Court without a jury and the

Lumber Company's case against Bedal was tried before the Court *and* jury. (R. 90.) At the trial of the case the trial Court admitted into evidence certain papers and pleadings in the case of A. M. Powell v. Union Pacific Railroad Company, consisting of the complaint of Powell, the answer of the Union Pacific, the verdict of the jury, and the judgment of the Court, the Union Pacific's motion for a judgment notwithstanding the verdict, the order of the Court overruling the Railroad's motion for such judgment, the Railroad's motion for supersedeas bond, the Court's order granting such bond, the Railroad's notice of appeal, the supersedeas and cost bond, designation of the record on appeal, reporter's transcript, notice to the appellee of the appeal, the filing of bond, order extending time for filing record on appeal, satisfaction of judgment, and notice to dismiss appeal. All of the latter were admitted as plaintiff's Exhibit No. 2. (See pp. 128, 154.)

The Railroads then submitted as Plaintiffs' Exhibit No. 3 the request for admissions served upon the Lumber Company which were not answered, and which under Rule 36 were deemed to be true. (R. 155, 156.) By these admissions the Lumber Company admitted that a piece of timber broke off a log and injured Powell on September 15, 1949. It also admitted that Bedal or his servants were using the premises covered in Exhibit "A" and that Powell was injured while logs were being unloaded from the truck. The Lumber Company also admitted that it owned the logs

that were being unloaded from trucks and then loaded on the railroad cars at Banks, Idaho, and that Bedal was performing the loading and unloading on behalf of the Lumber Company. Further the Lumber Company admitted that Bedal was paid for these services.

Plaintiffs' Exhibit 4 contained admissions of the third party defendant, W. O. Bedal (R. 158), which were similar to those just mentioned except Bedal denied that he was loading logs at the time Powell was injured. (R. 158.)

The Railroads then called Earl W. Bruett as a witness. He was the assistant engineer for the Union Pacific Railroad Company. (R. 161.) Plaintiffs' Exhibit 5 was introduced which was a blueprint showing the railroad track and right of way and the premises leased to The Hallack and Howard Lumber Company at Banks. (R. 162, 13.) The leased area is shown in yellow. Certain trees were shown on the blueprint and the word "trees" was written opposite them. (R. 163.) At that place Burett testified the roadway on the lease was 18.7 feet higher than the top of the railroad below. (R. 164.) In general the track shown in the lease ran north and south. (R. 162.) From the top of the roadbank east toward the railroad track there was a drop. However, there was a level portion between the tracks and the foot of the drop which amounted to approximately 15 or 20 feet. (R. 166.) The road was right at the very edge of the slope. The length of the slope at the place near the clump of trees was about 47 feet. (R. 167.) From the center of the side track shown on the map, Plain-

tiffs' Exhibit No. 5, to the edge of the lease is 8.5 feet, according to Bruett. The track itself is 4 feet 8½ inches wide between the rails. Thus the leased property would be about 6 feet from the west line of the railroad track. (R. 168.)

The Railroad next presented the testimony of George Hibbard, an employee of Bedal's, who was unloading his truck at the time Powell was injured on September 14, 1949. (R. 168.) Hibbard stated that he was unloading logs from a truck near a clump of trees at about the time Powell was injured. He marked an (x) in red pencil at that place. (R. 170.) The logs were unloaded and pushed toward the track. The logs would be unloaded by putting a cable underneath the load and then by using a boom. A bulldozer would push the logs off the truck and down the slope. (R. 169.) Hibbard, while using the bulldozer, would be on the west side of the logs at the time they were unloaded (R. 171), although on page 169 he stated that he was "east on the side". Nevertheless, in answer to a question on page 171, in which he was asked if he was standing on the opposite side of the load of logs from where the railroad cars were down below, he answered "Yes." (R. 172.)

Earl W. Bruett was recalled by counsel for Bedal at which time he stated that the elevation from the point Hibbard marked on the map, plaintiffs' Exhibit 5, from the roadway to the railroad track was 18.7 feet.

Plaintiffs' Exhibit No. 6 was introduced and admitted, consisting of the Railroad's costs, expenses

and attorney's fees in the trial of the earlier case brought by Powell against the Union Pacific Company. (R. 174.)

The Railroad then introduced certain portions of the testimony of Albert M. Powell, the plaintiff in the earlier action. (R. 176.) This testimony was admitted only in the Railroads' case against the Lumber Company.

At this point it should be noted that both the Railroads and the Lumber Company introduced Exhibit No. 7 for the purpose of showing the scope of what was adjudicated in *Powell v. Union Pacific Railroad Company.* (R. 174, 235.) Exhibit 7 consists of the transcript of the proceedings in the *Powell* case together with the Court's instructions. Although in the Railroad's action against the Lumber Company the Railroad did not read all of Powell's testimony into the record, nevertheless, since it also appears as the Lumber Company's Exhibit No. 7, it is convenient to include all of the pertinent testimony of Powell as it appears in the original transcript. For the purpose of this Statement of Facts the testimony of Powell as it was introduced into the record will be noted first and the testimony that was left out of the present record, but as it appears in Exhibit No. 7, will be examined next.

Powell was a car inspector for the Union Pacific Railroad Company, and went to work at Banks, Idaho, on June 1, 1949. (R. 177.) Powell's duty was to inspect the loaded railroad cars after logs were

placed on them by means of a loading machine. (R 178.) Powell testified that the loading track was within two or three feet of the bunkers. The bunker was simply a row of logs, one on top of the other, placed near the track to keep the logs that rolled down the hill from coming into violent contact with the cars on the other side of the bunker.

In describing the logging operations, Powell stated that the trucks would come in from the west on a little private road. The truck would stop and a caterpillar with a hoist on it would operate in such a way as to lift the load off the truck, and the logs would roll down and hit the bunker log, and they would stop if the bunker log stopped it. The bunker logs in front of the track were about 6 to 8 feet high at the time of the accident. Immediately prior to the accident the bunker was full of debris, limbs, small logs and bark, making it difficult for the bunker to stop the logs, and some of them would spill over and strike the cars. (R. 180.) Harry Hansen and Charles Ritter also testified that there was debris behind the bunkers. (R. 215, 196, 197.)

On the morning of the accident Powell had gone about 60 to 80 feet north of the railroad car towards which a truck was about to unload logs. (R. 181.) He stepped from the top of the empty railroad car up about two feet to the bunker. (R. 182, 183.) He went north of the place the truck was unloading in order to be in a safe place and stood with three other men, Ritter, Hansen and Parrish. (R. 184.) Powell

did not see anything coming through the air until Ritter yelled "Look out there", and then he saw the slab, possibly three feet from him. (R. 185.) Powell was hit and injured and because of these injuries he brought his action against the Union Pacific Railroad Company, (R. 185), because of its failure to furnish him a safe place to work. (R. 128, 130.)

Powell also pointed out that in loading the railroad cars the cars would start being loaded on the south end of the bunker, and then as each car was loaded the one next to it to the north would be loaded, and the trucks on the road would dump the logs to each particular car, depending on which was to be loaded. (R. 187.) Bedal was responsible for cleaning out the debris behind the bunker. (R. 190.) The logs that made up the bunkers were the largest logs that Bedal could obtain. (R. 191.)

The testimony of Harry H. Hansen was read into the record. The Hansen testimony appeared in the prior case of *Powell v. Union Pacific Railroad Company.* Hansen was employed by Bedal and was standing near Powell at the time of the accident. (R. 199.) The testimony of Hansen that is new is that the loader near the railroad car was shut down so that the logs could be dumped off the truck. (R. 200.) Like Powell, Hansen did not see the slab when it broke off the log. (R. 22, 204.) Hansen claimed that he had been in the same business since he was 18 years old, now being 32 years old, and that the men below the unloading logs always moved away

from them when they rolled down the hill. (R. 205.) Hansen testified that in his experience he had never seen a slab that large let go. (R. 206.) Hansen speculated that probably the slab came from an unseen splinter from one of the logs in the load. (R. 206.) Hansen also stated that logs had been unloaded at Banks in the same manner for a long time. (R. 207.) Page 208 of the Record shows Hansen was asked:

> "During that time—let me ask this, operation of the unloading of logs at the time Mr. Powell was injured, was it the same operation that you had been performing since May, 1949, since you had been there?
>
> A. Yes, sir."

Hansen also testified that when the logs came off the load they came down with quite a force. (R. 208.)

The testimony of Charles Ritter was then read into the record. Ritter also was employed by Bedal. (R. 211.) Ritter added to the testimony of the others a few items. First he described how the logs were pushed off the trucks. He testified the logs were pushed off in a series. Four or five would go at a time, and there would be about three pushes per load. (R. 215, 216.) He, like the other men, including Powell, always went about 60 feet away to get away from the logs being unloaded. (R. 216.) Unlike either Hansen or Powell, Ritter saw the slab break off the log. The slab did *not* break off the log when it hit the flat place below where the debris was,

but instead broke off when it was about half way down the hill. (R. 217.) It weighed approximately 80 pounds and was 4 or 5 feet long. Again, on page 221 of the transcript, Ritter pointed out that the log had gone half way down the bank—down the 50 foot incline—when he saw the slab break off the log and fly through the air, at which time he hollered. Ritter also testified that the logs were handled that day just as they were handled prior to that time that this truck load was dumped. (R. 218.) Further, Hansen, like the others, had never seen a slab like this break off before. (R. 218.) Usually bark flew off and went straight down the hill although at different times bark might go off at certain angles. (R. 220.) It was Hansen's belief that the slab flew off the first bunch of logs that came down the hill, but he was not sure. (R. 222.) He was sure that only one slab flew off. (R. 223.)

Albert Parrish's testimony was also read into the record. (R. 224.) He did not see the slab break off, although he saw it in the air, about 10 or 12 feet from the logs, flying toward the east. (R. 22, 225, 226.) Parrish also stated that he thought the bunker logs were about three or four feet from the railroad cars. (R. 227.) Parrish too, was employed by Bedal.

The next witness, Howard Sage, was employed by The Hallack and Howard Lumber Company. He was a scaler. He would scale the logs and determine the number of board feet in them before they went onto the railroad cars. Sage's testimony was the last

read into the record. He, too, had gotten away to what he called a safe place—about 60 feet from where the logs rolled down the hill. (R. 229.) Sage did not see the slab break off, but did say he saw it in the air and testified it came from the west and south. He also testified on pages 231 and 232 in part as follows:

> "Q. Do you know about how far those logs were down the hill after they had been dumped, when you saw the slab coming through the air?
>
> A. About half way, I would say.
>
> Q. I presume that you had watched this kind of unloading for a long time up there?
>
> A. Hundreds of times, yes, sir.
>
> Q. Had any thing of this particular nature ever occurred before?
>
> A. I have never noticed anything like this, no, sir.
>
> Q. Had you seen anything fly off those logs before?
>
> A. Yes, pieces of bark would be about all."

Sage testified that the average log contained about 200 board feet and weighed about 9 pounds per board foot, and the distance from the top of the logs, that is the top of logs on the truck to the ground was 12 or 13 feet. (R. 232.) Finally Sage said the logs were on their own when they were dumped from the truck. (R. 234.)

Following Sage's testimony the Railroads rested. The Court ordered judgment in favor of the Railroads and against the Lumber Company because of

the Lumber Company's indemnifying agreement with the Union Pacific Railroad Company.[1]

Then the Lumber Company presented some additional evidence in the action against Bedal. Exhibit 7, the transcript in the *Powell* case, was admitted for the purpose of showing the scope of what was adjudicated in the prior action. (R. 235.) On page 236 of the transcript counsel for the Lumber Company, as well as counsel for the other parties, stipulated that L. H. Anderson, if sworn as a witness, would testify that he was counsel for the Railroad and that he had charge of the litigation in the *Powell* case, and that he would have said that if either Bedal or his insurance carrier had offered to take over the defense, or to assist Mr. Anderson, and his client, that they would have accepted such defense, or assistance, and that it was also stipulated that at no time did Mr. Anderson or the Railroad Company call on Bedal to defend that case. (R. 236.) We wish to make clear that this stipulation was made on September 22, 1953, and referred to the *Powell* case tried on February 26, 1951. (R. 135.)

---

[1]The only issue tendered by the Railroads' complaint against the Lumber Company was that the lease agreement provided under certain circumstances that the Lumber Company would be liable for the Railroad's own negligence. (R. 3, 7.) The trial judge also made this clear from his comments that the lease provision constituted the sole basis for his decision. (R. 254, 255, 234, 235.) There was no basis for the Finding of Fact submitted by the Railroads that Bedal was negligent. (R. 97, 98.) Bedal asked the trial Court to amend these findings consistent with issues tendered and the evidence presented (R. 113), but the lower Court failed to do so, and Bedal has appealed from those portions of the Findings of Fact and Conclusion of Law which state Bedal was negligent (R. 117).

The Lumber Company then presented the testimony of U. R. Armstrong, who was the general manager of The Hallack and Howard Lumber Company. Armstrong identified the logging contract, Exhibit 8, and stated that the Lumber Company had nothing to do with the actual practice of unloading the logs, or loading them on the freight cars. (R. 238, 239.)

Armstrong testified that the Banks landing consisted of the roadway along on top of the hill, the incline itself, down which the logs were rolled, and the bunker. (R. 240.) The roadway was in the same place at the time Bedal entered into the contract as it was at the time of Powell's accident. As a matter of fact the same road had been there a long time before the contract was entered into. (R. 240.) This is the roadway from which logs were dumped from Bedal's trucks. On page 241, the Court sustained an objection to a question posed by counsel for Bedal on the cross examination of Armstrong which was as follows:

> "Q. And had been used for the same purpose?"

Bedal's counsel, Mr. Elam, was at that point referring to the use of the road. The Court said that the answer to the question was immaterial. Further, on page 241, the Court sustained an objection to the question,

> "Q. Is that the customary and ordinary way for unloading the logs?"

Although the trial Court would not allow these questions to be answered, it is clear from testimony of other witnesses that the road had been used for the same purposes for many years and that the logs were being unloaded in the customary way.

After Armstrong's testimony the Lumber Company rested. In a final presentation of the case, counsel for Bedal asked for a motion to dismiss the third party complaint, and counsel for the Lumber Company moved for a directed verdict. (R. 242, 245.) In a statement to the jury the Court granted the Lumber Company's motion for a directed verdict. (R. 248.) In its comments to the jury the Court pointed out that in the *Powell* case the first jury had found that Bedal was negligent in unloading the logs, though not a party, (R. 248), and that the question of whether the rolling of the logs down the hill was negligent was left in the *Powell* case to that jury and that Bedal should not now be allowed to gamble on still another jury. (R. 249, 254.) Comments of the Court on page 250, 254, 255, showed that the Court granted judgment in favor of the Railroads against the Lumber Company by reason of the indemnify agreement supposedly contained in the contract and lease between them.

Since in plaintiffs' Exhibit No. 7 the whole transcript of the prior *Powell* case was put into the record in order to determine the scope of the prior adjudication, it will be necessary to examine certain other facts appearing in that case. For example, con-

cerning the debris that was behind the bunker, though in itself not relevant in any of the actions so far as the breaking of the slab off the log is concerned, Powell testified that he had told the Union Pacific Railroad agent, Mr. Russell Eldridge, about the debris at least three times prior to the accident and stated that it created a dangerous condition. (See Exhibit 7, pp. 11, 12, 13 and 67.) Eldridge admitted that Powell did complain to him about the debris but felt he was actually concerned because the logs occasionally hit the railroad cars. (Exhibit 7, pp. 81, 85.) Eldridge also testified that logs had been going over the bunkers and hitting the cars all year long during that logging season. (p. 88.) Powell[2] also said he didn't move further north because he had

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[2]The exact testimony of Powell appearing on pages 61 and 62 of Exhibit 7 is as follows:

"Q. Yes, but I was wondering why you didn't move further to the west, you said that you were 60 feet away and I wondered why you didn't move further to be away from this stuff that would fly off these logs?

A. I never saw it go this far before this time.

Q. You were not anticipating such a thing to occur?

A. No.

Q. It hadn't ever occurred before?

A. No, not that far.

Q. All that had occurred before was the bark or a piece of the bark would fly off and go a short distance and that is the reason that you dropped over about 60 feet of where those logs would come down?

A. Sure, I would be away from where they were unloading. A log might start off that hill and go over to another direction.

Q. It wasn't an unusual operation, it was the same operation that they had been performing for a long time in dumping the logs and in the manner that they came down?

A. You mean how they came down?

Q. There wasn't anything unusual about the operation, it

never seen anything (referring to the slab) go off that far before. (Exhibit 7, p. 62.)

Powell also testified that the unloading operation was the usual dumping operation that had been going on for a long time. (Exhibit 7, p. 62.)

Powell claimed that the load of logs on the truck was 12 feet from the ground, that is, 12 feet from the top of the load to the ground, and that usually there were 8 feet of logs on the truck bed. (Exhibit 7, p. 64.)

At the end of the trial, counsel for Mr. Powell amended his complaint (See Powell transcript, page 177), since it became clear that the slab broke off the log while it was being unloaded in the usual and customary manner. The debris filled bunker had nothing to do with Powell's injury.

In its instructions to the jury in the *Powell* case the trial Court stated that the Railroad Company was required to furnish its employees with a reasonably safe place to work. The Court also instructed the jury that contributory defense was not an absolute bar, but that it could only be considered, if any was to be found, in assessing damages. Bedal's name is not mentioned in the instructions, nor was

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was the same operation that they had been performing for a long time?

Mr. Langroise. We object to that as calling for a conclusion, he can ask for and the witness can state the facts.

The Court. Yes, he may answer as to what happened.

A. It was the same operation, the same dumping operation."

any fact mentioned concerning the manner in which logs were unloaded. The only specific instruction on negligence was that the Railroad was under a duty to furnish its employees with a safe place to work. (See Instructions, Exhibit 7, pp. 182, 203.)

Since certain specific sections of the leases and contracts involved in these actions will of necessity be discussed in the argument, it is not considered necessary here to include the provisions that will be discussed at that later time.

STATEMENT OF THE CASE FOR BOTH APPEALS.

W. O. Bedal is appealing from the judgment granted by the lower Court in favor of the Railroad and against The Hallack and Howard Lumber Company, and from certain Findings of Fact and Conclusions of Law filed in support of the Judgment. Bedal is also appealing from the judgment and the order of the Court directing the jury to render a verdict in favor of The Hallack and Howard Lumber Company and against Bedal. In this later case, Bedal appeared as a third party defendant. Appeal from two judgments are involved in this case. These appeals are treated together in this brief, in so far as the JURISDICTIONAL STATEMENT, SPECIFICATIONS OF ERROR and the STATEMENT OF THE CASE are concerned. However, there are separate arguments in the brief relating to matters

peculiarly applicable to each specific appeal. Where there matters would be repetitious in both appeals if treated separately, they have been discussed in the first argument and referred to in the second argument. The first ARGUMENT deals with Bedal's appeal from the judgment rendered against him and in favor of the Lumber Company after the trial Court took the matter away from the jury by directing a verdict in the Lumber Company's favor. In the second ARGUMENT, Bedal supports his position that the judgment rendered by the trial Court in favor of the Railroad was erroneous in the first place, and subsequently, of course, the subsequent judgment in favor of the Lumber Company and against Bedal would then be erroneous.

On September 15, 1949, an employee of the Union Pacific Railroad Company, A. M. Powell, successfully sued the Railroad because of injuries he sustained when a slab from a log that was being unloaded at Banks, Idaho, struck him, while he was standing on a log bunker. The Railroad was charged with providing its employee with a safe place to work. There was nothing unusual about the logging operation conducted on the day of Powell's injury. The Railroad had full knowledge of the way it was conducted that day as it did for months and years before. Neither The Hallack and Howard Lumber Company nor W. O. Bedal were parties to that first action. W. O. Bedal was never asked by either the Railroads or by the Lumber Company to defend that

action. He was never asked to assist in it, nor in any manner to participate.

The Lumber Company is now trying to hold Bedal to all of the results of the first action by Powell against the Railroad Company as if Bedal, himself, was a party to that first action. Counsel for the Lumber Company in his motion for a directed verdict (R. 245) argued that Bedal was adjudged negligent in the *Powell* case, and that this negligence made him liable over to the Lumber Company, an innocent party. The trial Judge of the Idaho Federal District Court, the Hon. Chase A. Clark, agreed with counsel for the Lumber Company, and so stated his opinion in his charge to the jury, asking them to bring in a directed verdict. (R. 254.)

The Lumber Company was held liable to the Railroad because of a provision in its lease, which was construed by the trial Court as requiring that the Lumber Company indemnify the Railroad on account of the Railroad's own negligence. There was no evidence, whatsover, that the Lumber Company was negligent. (R. 10.) The Lumber Company, of course, since it stands in the position of an insurer or indemnitor of the Railroad Company, can only recover against Bedal if the Railroad could recover against Bedal. Bedal contends that there is no evidence in the first case tried on September 15, 1949, in which the Union Pacific Railroad Company was adjudged negligent, to charge Bedal with any kind of negligence. As a matter of fact, Bedal contends

that he is entitled to review the whole record, and to have his liability, if any, determined by a jury, and to have the liability of the Railroad to Powell retried also. Bedal could in no way be connected with the prior adjudication. He was not asked to defend by either the Railroad or the Lumber Company, and he had no opportunity to take part in the litigation. Consequently, the first case could not under any circumstances be *res judicata* against Bedal.

The Lumber Company, since it introduced the transcript of the first case (See Exh. 7) is bound by the facts adjudicated therein. The undisputed facts in the *Powell* case show that the Railroad Company had full knowledge of the method and manner of unloading logs at the Banks site. The Railroad knew precisely how logs would be unloaded and the undisputed evidence shows that the logs were unloaded at the time of Powell's injury in the same manner as they had in prior months and years. If this was a dangerous condition it was acquiesced in by the Railroad. Bedal contends that the Railroad is a joint tort-feasor as a matter of law, and as such could not recover against Bedal directly on the theory of implied indemnity. As a consequence, neither can the Lumber Company.

In addition, Bedal claims it was error for the trial Court to fail to submit the question of Bedal's negligence to the jury. Even if it were determined that the Railroad was passively negligent, still it is a question for the jury as to whether or not Bedal

was negligent and whether Bedal's negligence was the primary cause of the accident. These questions have always been held to be for the jury. Bedal, furthermore, contends that it was not necessary in the first action that his negligence be determined at all, and consequently, according to the theory of *res judicata* it would not be determined, since he was not a party, and this determination should be left to still another jury. This the trial Court refused to do.

The record in this case, together with Exhibit 7 shows conclusively that the Railroad was negligent in placing Powell in a place near what was recognized as an inherently hazardous operation that was a natural incident to the logging business. There is no evidence that the unloading operation itself was negligently conducted. Bedal had nothing to do with Powell being where he was at the time of his injury.

Although it is not the main contention of the Lumber Company, it did allege in its complaint that Bedal's contract with the Lumber Company should be construed as an indemnity agreement. This contract called for the cutting, hauling, unloading and loading of logs. Bedal was an independent contractor. Bedal claims that this agreement can in no way be considered as an agreement to indemnify. As a matter of fact, counsel in his argument to the Court, in support of its motion for a directed verdict, did not even mention the contract being one of indemnity. (R. 245, 247.) Since Bedal was not adjudged negligent in the first action, or in any action, his agree-

ment to carry liability insurance on his trucks cannot be construed to be an agreement of indemnity. Furthermore, since the Lumber Company was held responsible to the Railroad, by virtue of its indemnity agreement, and not by reason of any negligence on its part, such a provision in the logging contract of Bedal could in no sense be construed as a promise to indemnify. A reading of this long logging contract makes clear that nowhere in it are the specific words required of an indemnity agreement.

Since Bedal was asked to defend the suit by the Railroads against the Lumber Company, and since Bedal answered the complaint of the Railroads against the Lumber Company, and further, since Bedal appeared at the trial and cross-examined certain witnesses put on by the Railroad, and, of course, since Bedal's responsibility if any, rests upon a recovery by the Railroads against the Lumber Company, Bedal has appealed from the judgment of the trial Court awarding the sum of $18,334.15 to the Railroads. Bedal has also appealed from the Findings of Fact and Conclusions of Law as submitted by the Railroad (R. 92, 98), and as amended by the trial Court (R. 113). The trial Court did amend the Findings to clearly show that Bedal was an independent contractor of the Lumber Company, and not the Lumber Company's servant or agent. (R. 112.) Bedal, however, objects to the Finding of Fact that the unsafe place—referring to the logging site—was created by the negligence of Bedal, and that this

negligence was the active and primary cause for Powell's injury. (R. 113.) Bedal contends that there were no issues tendered by the Complaint of the Railroad against the Lumber Company on which such a finding could be predicated. Such a Finding was irrelevant to the action since the Court held that the Lumber Company was responsible to the Railroads by reason of its lease provision, and for no other. Furthermore, there was no evidence in that case that Bedal was negligent, or that his negligence was the primary or active cause for Powell's injuries. This finding is improper because in the first case of *A. M. Powell v. Union Pacific Railroad Company,* no such finding that Bedal was negligent could be made either.

It is clear from the pleadings, the evidence, and the statements of the trial Court (R. 254) that the Railroads were successful by reason of Section 5 of their lease agreement. (R. 10.) Section 5 of the lease agreement, (the Railroad leased a small part of its right-of-way for a consideration of $55.00 a year to the Lumber Company), provided in substance that the Lumber Company should at all times protect the Railroad from all injury or damage by reason of the occupation of the leased premises, or from any cause whatsoever growing out of lessee's use thereof. Bedal contends that this language is not sufficient as a matter of law to hold the Lumber Company, an innocent party, responsible for the negligence of the Railroads. Appellant also examines

the rule of law that such an agreement of indemnity should be strictly construed and unless it is clear from the language of the lease, a provision hinting of indemnity must be construed against the Railroad particularly where the Railroad seeks to be held harmless from its own negligence.

Appellant calls particular attention to *Booth-Kelly Lumber Company v. Southern Pacific Company,* 183 Fed. 2d 902 (9th Cir.). Bedal contends that in both of its appeals, this decision supports the position of appellant and that if the Court follows the principles set forth in the *Booth-Kelly* case, then both judgments against Bedal must be reversed. (See Appendix for a discussion of this case.) In addition Bedal contends that since the evidence shows without doubt that the Union Pacific Railroad Company was at the very least a joint tort-feasor because of its acquiescence in any condition that existed at the time of Powell's injury, the trial Court's failure to dismiss the complaint and to direct a verdict in favor of Bedal was error.

SPECIFICATIONS OF ERRORS.

1.

That the Court erred in denying the motion of third party defendant to dismiss the third party complaint.

2.

That the Court erred in sustaining and granting the motion of third party plaintiff for a directed verdict.

3.

That the Court erred in its Findings of Fact and Conclusions of Law in the following particulars:

(1) In making the following Finding of Fact:

"That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, by and through W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; that the active, direct, proximate and primary cause of said Powell's injuries was that of the defendant, The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to."

(2) In making that portion the following Conclusion of Law:

'or independent of said lease."

4.

That the Court erred in sustaining the motion of Union Pacific Railroad Company to strike the separate defenses of third party defendant.

5.

That the Court erred in rendering judgment to Union Pacific Railroad Company.

6.

That the Court erred in rendering a judgment in favor of third party plaintiff and against Bedal for the reasons, and on the grounds as follows:

(a) There is no evidence in the record or in any of the exhibits, whatsoever, that shows that Bedal was negligent.

(b) The jury did not and could not find in the case of A. M. Powell v. Union Pacific Railroad Company that Bedal was negligent.

(c) The case of A. M. Powell v. Union Pacific Railroad Company in any event is not *res judicata* as far as Bedal is concerned because he was not given an opportunity to defend that case, or asked by any party to assist in it. Furthermore, the evidence in that case, exhibit 7, shows Bedal was not negligent.

(d) The Hallack and Howard Lumber Company, as a subrogee, stands in the same shoes as the Railroad.

(1) The undisputed testimony in the case of A. M. Powell v. Union Pacific Railroad Company shows that the Railroad acquiesced in a dangerous condition, and thus was a joint tort-feasor. The Lumber Company, too, would have no better right than the Railroad, and since there can be no recovery between joint tort-feasors, the Lumber Company could not, as a matter of law, recover from Bedal.

(e) Whether Bedal was negligent or not, and whether or not this negligence was the primary cause of the injury to Powell, was a question for the jury.

7.

That the Court erred in ruling on objections to evidence as appears in the transcript of the record as follows:

(a) The Court erred in refusing to allow the Lumber Company's witness, U. R. Armstrong, to testify that the roadway above the Banks logging site had been used for the purpose of unloading logs for a long time prior to Powell's injury, and that the method of unloading the logs on the day of his injury was the customary and ordinary way for doing that kind of work. (R. 240, 241.)

(b) The specific questions objected to and held to be immaterial by the trial Court are as follows:

> "Q. And had been used for that same purpose?
>
> (The question is referring to the use of the road.)
>
> Q. And there was no other road there from which to unload these logs?" (R. 241.)

> "Q. Is that the customary and ordinary way for unloading the logs?"

(c) Bedal specifies that the failure of the Court to allow Armstrong to answer these questions was error because the answer would further establish and support other evidence that the Railroad knew of

conditions that existed at the time Powell was injured, and if those conditions were dangerous, acquiesced in them.

ARGUMENT I.

A PERSON IS NOT BOUND BY A JUDGMENT TO WHICH HE IS NOT A PARTY, NOR PRIVITY TO A PARTY, AGAINST WHOM THE JUDGMENT WAS RENDERED, OR IN FAVOR OF WHOM THE JUDGMENT WAS RENDERED, UNLESS THE ORIGINAL JUDGMENT WAS AGAINST THE INDEMNITEE, AND THE INDEMNITOR WAS NOTIFIED OF THE SUIT AND GIVEN AN OPPORTUNITY TO DEFEND IT.

The trial Court directed a verdict in favor of The Hallack and Howard Lumber Company, and against W. O. Bedal, the third party defendant. The trial Court in its statement to the jury pointed out that in its opinion Bedal was adjudged negligent in an action between A. M. Powell and the Union Pacific Railroad Company.[3] In the trial Court's opinion W. O. Bedal was adjudged negligent in the Powell case, and the Court held that this negligence was responsible for the later judgment against The Hallack and Howard Lumber Company. The Railroads recovered a judgment against the Lumber Company, because the Lumber Company in its lease agreement contracted to indemnify the Railroads on account of any damages, judgments, etc., which the Railroad might have entered against them by virtue of the occupation of the leased premises. (R. 10.)

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[3]This case was tried in front of a jury on September 15, 1949.

Appellants feel that a great many questions of law and facts have been raised in this appeal. We feel that every single one of them is important, and merits the full consideration of the Court. On each of the grounds we will mention we believe that the many errors committed by the trial Court are reversable errors, and that the judgment of the Court against Bedal should be set aside as well as the judgment entered against the Lumber Company.

A stranger to a lawsuit cannot be bound by the results of action to which he is not a party. It is the firm contention of Bedal that not only is he not bound by any of the facts adjudicated in the action of A. M. Powell v. Union Pacific Railroad Company, but that he is entitled to retry every single issue presented in that case. He is entitled to retry the question of whether or not Powell should have recovered a judgment against the railroads in the first place, and whether the Railroads were negligent or not. He is entitled to retry the question of whether or not Powell was contributorily negligent, or had assumed the risk of his employment.

The Hallack and Howard Lumber Company in their complaint, (R. 19), allege that Bedal is the indemnitor of the Lumber Company. In its first count the Lumber Company states that Bedal was liable to the Lumber Company because of an express indemnity agreement. Secondly the Lumber Company claims (and this is the real charge in their complaint upon which they rely) that Bedal is liable because of

an implied indemnity agreement. By implied indemnity agreement the Lumber Company means that Bedal's negligence was the primary cause of Powell's injury. The Railroad's negligence was passive. The Lumber Company, having paid the Railroad, would stand in its shoes and therefore could assert the Railroad's right against Bedal as though it were a subrogee.

Regardless of the theory of indemnity which we will discuss later, the question still remains to what extent is Bedal bound by the original lawsuit. Appellants will make an effort to examine cases which fundamentally set forth the principles of *res judicata,* and further to apply the rule in these cases to the facts at hand. Bedal feels that the conclusion is inescapable, that it could not, and is not, bound by the prior judgment rendered in favor of Powell. It is well settled, of course, that the doctrine of *res judicata* does not operate to affect strangers to a judgment. *In re Sharp,* 15 Idaho, 120, 96 Pac. 563; 30 Am. Jur. Sec. 220. This of course is a common sense rule. To make another person liable for a judgment rendered in a separate independent action, without the right of examination or cross-examination, without the right to introduce evidence, or the right to appeal, would make such person liable for a judgment and for all the effects of a judgment without an opportunity to have his day in Court. This, of course, is contrary to our American theory of jurisprudence.

There have been several extensions and refinements of the doctrine of *res judicata.* It is held, for example, that a person in privity with a person who is a party to an action, is bound by the results of that action as if he, too, were present. For example, a person who controls an action, and has a financial stake in the actual trying of the case, or a person whose interests are represented by a fiduciary, or by an entity or corporation of which he is a part, or a transferee from a party to the action, are all held to be what is known as "in privity" to one another. The question of privity and who is bound in a lawsuit, and what is *res judicata,* has been examined by Warren A. Seavey, in his article in the Harvard Law Review, entitled "Res Judicata. Reference to Persons neither Parties nor Privities". Harvard Law Review, Vol. 51, 1943, page 100.

It is also said that the only time that a prior judgment will bind even the same parties to the action is where the issues in a later suit are identical and where there is mutuality between the parties. Nevertheless the doctrine has gone one step further, but only one step further. It has been extended to a situation where the same issues are being tried, and the party who brings the second action against a different party, was unsuccessful in the first action. The new parties can successfully *defend* on the ground of *res judicata,* but if in the first action the plaintiff was *successful* and then later sued a new and entirely different party on the identical issues, then he,

the plaintiff, cannot insist on the doctrine of *res judicata* as binding the new defendant. Here the Courts say that there was a lack of privity between the parties, and the defense of *res judicata* is unavailable in the plaintiff's favor. See Comment, Yale Law Journal, 35 Y.L.J. 607, March, 1926.

An example of the latter principle is contained in *American Surety Company v. Singer Sewing Machine Co.,* 18 Fed. Sup. 750, 753, in which the New York District Court states as follows:

> "In the proceedings which the Baldwins took against the surety company in Idaho, it was decided that the bond covered Anderson, as well as the Singer Company. The judgment that the surety company was finally compelled to pay was an adjudication by due process of law in favor of the Baldwins and against the surety company, to the effect that the bond constituted an agreement to pay if the appeal went against Anderson. While the Singer Company was not a party to that suit, the facts there adjudicated against the surety company are conclusive against it when it seeks to compel the Singer Company to respond to the loss sustained in that suit."

In this case the American Surety Company, as plaintiff, was suing the principal on its bond. The plaintiff had earlier allowed what amounted to a default judgment to be taken against it. The Court felt that since this was the case, the Singer Company could not be responsible on its indemnity agreement.

The surety company was not allowed to take advantage of its own mistake.

But an entirely different situation arises where an indemnitor is sued and he is not a party to the prior suit, nor given an opportunity to defend a prior suit from which it is claimed the liability of the indemnitee arose. In this respect it is interesting to examine the applicable Restatements, both of Judgments and Restitutions, that would be applicable to this case.

Restatement of the Law of Judgments, Sec. 107, provides as follows:

> "RIGHTS OF INDEMNITEE AND INDEMNITOR INTER-SE AFTER JUDGMENT AGAINST ONE OF THEM.
>
> In an action for indemnity between two persons who stand in such relation to each other that one of them has a duty of indemnifying the other upon a claim by a third person, if the third person has obtained a valid judgment on this claim in a separate action against
>
> (a) The indemnitee, both are bound as to the existence and extent of the liabilty of the indemnitee, if the indemnitee gave to the indemnitor reasonable notice of the action and requested him to defend it or to participate in the defense."

The Court will note that in the body of this Restatement which would be applicable to this case, the editors only contemplate an action in which the indemnitee himself was actually a party to the prior

suit. The Hallack and Howard Lumber Company was not a party to the prior suit. (A. M. Powell v. Union Pacific Railroad Company.)

In many cases, too, even where the indemnitee is a party to the first suit, the indemnitor may be under no duty to defend the first action, and of course would not be bound by it unless he were. For example on page 513 on the above Restatement, paragraph 3, there is a comment on clause (a), which states as follows:

> "Where a person is under a duty to another to indemnify the other against losses suffered as a result of a breach of contract or for a tort, the indemnitor is entitled to a trial to determine whether his liability has come into existence. He may or may not be under a duty to the indemnitee to defend the action against the latter, and if he is under no such duty he commits no breach by failing to defend. In this event he is entitled, in the subsequent action against him for indemnity, *to show that the indemnitee was not subject to liability and hence not entitled to indemnity.*" (Italics ours.)

Subsection (a) of Restatement of Judgments, 107, points out that the indemnitor is bound as to the existence and extent of liability if the indemnitee gave the indemnitor reasonable notice of the action and requested him to participate in the defense. See Comment E of Restatement of Judgments, 107. In this Comment the following paragraph is inserted by the editors:

> "There must also be a tender of control either joint or full. In order to bind the indemnitor in a subsequent action against it, the indemnitee is not obliged necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate, and if the judgment is given against the indemnitee, he must permit the indemnitor to take appellant proceedings."

Appellants think it clear that the editor of Restatement of Judgments had in mind in Section 107, that in order for an indemnitor to be bound at all, the indemnitee must be a party to the first action. This certainly is true where the indemnitee Lumber Company is not even a party to the first action and did not, and coud not, give Bedal, the alleged indemnitor, an opportunity to defend the former litigation.

We have only to examine the facts to show that Bedal could not be bound in the first action. The injured party, Powell, an employee of the Union Pacific Railroad Company, sued only the Union Pacific Railroad Company. (R. 128.) It was only against the Union Pacific Railroad Company that Powell obtained a judgment. (R. 135.) The Lumber Company was not a party to that lawsuit nor was it a party to the judgment. The Railroad in turn sued the Lumber Company *after* rendition of judgment against it in order to recover on the basis of its express agreement.[4]

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[4]Bedal will point out later on in this brief that we feel the Court was in error in construing this indemnity agreement in favor of the Railroad Company.

In its complaint against the Lumber Company, (R. 3), the Railroad nowhere specifically states that it was recovering or sought recovery from the Lumber Company because of its negligence. The only sentence in the whole complaint that could be otherwise construed, and this would be stretching the import of plain words, is that the Lumber Company was liable because of its lease, or "independent of said lease" to the Railroad. he word "negligent" or "proximate cause", or "primary" or "secondary" negligence was never mentioned once in the complaint of the Railroads. Further the evidence clearly shows that the Lumber Company was not present either at the time the logs were unloaded, nor at any other times relevant to this action. Bedal was an independent contractor, as the Lumber Company itself alleged in its complaint against Bedal. (R. 21.) In its Findings of Fact and Conclusions of Law submitted by the Railroad, and signed by the trial Court, it should be noted on page 98 of the record that the Railroads did not contend in their conclusions of law that the Hallack and Howard Lumber Company was negligent. The Railroads did include in paragraph 11 of its Findings of Fact that the unsafe place where Powell was injured was the fault of the Lumber Company, "its agents, servants and employees," and the further finding that the Railroad Company was not guilty of active negligence. The Lumber Company objected to the Finding of Fact that it was the *employer* of Bedal. The trial Court sustained the objections of the Lumber Company and the Findings

of Fact and Conclusions of Law were amended to show that Bedal was an independent contractor.[5] Thus it becomes clear, not only from the evidence which dictates the result, but from the Findings of Fact and Conclusions of Law signed by the trial Court, that the reason why the Lumber Company was held responsible for the judgment against the Railroad in the Powell case was the simple fact that the Court felt the Lumber Company had expressly indemnified the Railroad against its own negligence in its lease with the Railroads.[6]

(Appellant would like to mention the general principle of law that a principal is not liable for the negligent acts of an independent contractor. This is such a common principle that appellant does not think it necessary to do other than refer to it. 27 Am. Jr. 504, Sec. 27.)

The Lumber Company was cognizant of the fact that in order to bind Bedal by a prior judgment there would have to be something additional pleaded in its first complaint. Consequently, the Lumber

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[5]Order of the trial Court dated September 25, 1953. (R. 113.)

[6]The Findings of Fact and Conclusions of Law in support of the Railroads' judgment against the Lumber Company did infer in paragraph XI that Bedal was negligent and his negligence was the primary cause of Powell's injury. (R. 97, 98.) The trial Court did not act on Bedal's motion to amend these findings (R. 113), and Bedal has appealed from them. The trial Court felt that Bedal was adjudged negligent in the *Powell* case. That this Conclusion was error we argue here. There can be no question, though, that such a Finding in the Railroads' action against the Lumber Company was outside of the issues tendered in that case and was not the basis for the trial Court's judgment in the Railroads' favor. (R. 254, 255, 235.)

Company amended its third party complaint and attached a letter addressed to Bedal and dated January 10, 1951. This letter was introduced as Exhibit No. F. (R. 64.) It is clear from a reading of this letter that the Lumber Company was merely advising Bedal and its insurance carrier on January 10, 1951, that it would look to Bedal in the event it was eventually held responsible for any judgment Powell might receive against the Railroad Company. Nowhere in this letter is there a statement that the Lumber Company tendered the defense of the Powell case to Bedal. Nowhere is there a request that Bedal enter that lawsuit. This letter is nothing more than a statement that the Lumber Company will hold Bedal and his carrier responsible for any ultimate liability that might or might not attach to the Lumber Company. This letter was written by a Company not even a party to the lawsuit. Can such a letter, can such a failure to tender a defense, can indeed such a set of circumstances, bind the appellant to a lawsuit to which he could not be, and was not, a party? It makes no difference that counsel for the Railroad would testify two and one half years after the Powell case was tried that had Bedal or his insurance carrier offered to take on the defense of the Powell case that the Railroad would not have objected. (Counsel stipulated that L. H. Anderson would so testify on September 22, 1953, R. 236.) Anderson's testimony not only came two and one half years late, but from it the Lumber Company wants the Court to draw the inference that the silent belief

of the Railroad would take the place of notice and a request to defend. The statement in the stipulation, however, that must bind the Lumber Company is that neither counsel for the Railroad Company, nor the Railroad Company at any time called upon Bedal to defend that case. (R. 236.) With these facts in mind, the leading cases on this subject should be examined and compared to the situation presented to this Court.

One of the leading cases in which the law of implied indemnity and the principles of *res judicata* connected therewith are discussed and applied is the case of *Washington Gas Light Company v. the District of Columbia,* 161 U. S. 316, 40 L. ed. 712. There the Supreme Court of the United States was considering an appeal as the Supreme Court of the District of Columbia. The Washington Gas Light Company was the defendant and was being sued by the District of Columbia on the theory of implied indemnity. Prior to the lawsuit, from which the Washington Gas Light Company had appealed, a woman by the name of Parker had fallen because of a hole in a sidewalk, been injured, and had successfully sued the District of Columbia. The hole in the sidewalk was created by a defectively installed gas box. The gas light company was in charge of the installation. At the time that Parker made a demand for recompense on the District of Columbia, the District in turn made a demand on the gas company to hold it harmless. Later, when Parker sued the District of Columbia, the latter asked the Gas company to hold it harmless, defend the case, and to participate in it. This the Gas Company refused

to do. Parker recovered a verdict against the District of Columbia and it in turn sued the Washington Gas Light Company. The District recovered a verdict after a trial in the lower Court. It is in this case, so often quoted, in which the Supreme Court of the United States re-emphasized the general rule and the rule applicable to cases of implied indemnity ever since. The Court held in substance that a person who has become liable in tort to another because of an injury caused by his negligent failure to protect the other from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of that liability, if the payor could have recovered from a third person for injury so caused to himself or to his own property. Restatement of the Law of Restitution, Sec. 94, p. 413. However, before a *prior* judgment can bind the defendant in a later suit by an alleged indemnitee, and before every fact in the prior suit is conclusive against the one sued, he must be given proper notice and a full opportunity afforded him to defend the first action. The Supreme Court made this clear in its opinion on page 329 of the United States Reports. The Supreme Court pointed out that once a person, an implied indemnitor, is duly notified and given an opportunty to come in and defend a lawsuit by the party against whom a claim is being made, he is no longer a stranger to that suit and he has the same "means and advantages of controverting the claim as if he were the real and nominal party upon the record."

The Court should compare the general rule elicited in *Washington Gas Light Company v. District of Columbia,* supra, to the facts in our case. Appellant feels that there is no question but what it was not afforded an opportunity to defend the Powell lawsuit as a matter of law. It was not asked to defend the claim of Powell against the Railroad. Bedal was not asked to take part in the trial. The Railroad Company, the defendant in the Powell lawsuit, did not and has never asserted a claim against Bedal. Under these circumstances, certainly, Bedal could not be bound by any single fact litigated in the original proceeding. Even the Lumber Company did not ask Bedal to defend the first suit nor did it have a right to do so.

There are numerous cases in which the general rule has been stated that before a judgment is binding on an alleged indemnitor, he must be given full notice and an opportunity to defend. See 42 Cor. Jur. Secundum, Sec. 32, (2), Sub-Sec. (c), p. 617.

United States Fidelity & Guaranty Co. v. Dawson Produce Co., 68 P. 2d 105 (Okla.);

30 Amer. Jur. 970, sec. 238;

Inashima v. Wardall, 224 P. 379, 128 Wash. 617;

Southwestern Railway Co. v. Acme Fast Freight, 19 S.E. 2d 286;

City of Lewiston v. Isaman, 19 Ida. 653, 115 P. 494;

Seattle v. Northern Pacific Railroad Company, 92 P. 411 (Wash.).

Nor it is sufficient that the indemnitor had actual notice, acquired independently, of the pendency of an original lawsuit to which he is neither a party nor a privity, if he was not formally noticed in to defend and *PARTICIPATE* in the proceedings by the *original party defendant,* who later claimed to be an indemnitee.

Burchett v. Blackburne, 248 S. W. 853.
Cases annotated in 34 A.L.R. 1429.

An example of the failure or inability to properly notify and bring in an indemnitor, and the results of such failure can be seen from the recent case of *Crawford v. Pope and Talbot, Inc., et al.*, 206 Fed. 2d 784, Third Circuit, 1953. In this case Pope and Talbot owned a ship. The National Boiler Cleaning Company contracted to clean out the tanks in the ship. An employee of National was injured in these tanks because of the unseaworthiness of the ship. The employee sued Pope and Talbot, the owners—who owed a non-delegable duty to make the premises safe for the employee, and Pope and Talbot cross complained against National and asked the lower court to bring National in as a third party defendant, claiming it was ultimately responsible for the injury to its own employee. The Federal District Court below took the view under National's pleading that it could not be held responsible because the original suit against Talbot was by National's own employee and consequently National would have the defense of the Longshoremen and Harbor Workmen's Compensation Act,

it being the exclusive remedy, 33 U.S.C.A. Sec. 901, et seq. However, the Court of Appeals for the Third Circuit held that the lower court's motion to dismiss National was erroneous since the defense of the Compensation Act did not apply between National and Talbot. The Circuit Court then was confronted with the effect of the prior suit by the employee against Talbot. On page 794 the Court pointed out the critical questions that it had to decide:

> "When will the Court in the indemnity litigation permit the parties to re-examine all the facts with the possible result that the original judgment is found wrong, thus leaving the indemnitee with nothing from which he can properly claim indemnity? And when will the Court consider the indemnitee and the indemnitor bound by the finding made in establishing the original judgment?
>
> "The general rule is clear. A person not a party to a case is not bound by the findings in that case in subsequent litigations involving the same facts situation. Where the subsequent litigation involved one of the same parties to the original case, even that party is not bound since his adversary, the new party, is not."

The Third Circuit Court held that National was under no duty to participate in the defense of the original action because the trial Court had dismissed it, even though mistakenly. That was true, even though Pope and Talbot had requested and demanded that National defend and hold it harmless in the ori-

inal suit. We think this case is important, and would like to quote the following:

> "We conclude that the answers to the questions posed above are as follows: If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action, and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the original action, where, on the other hand, the indemnitee and the indemnitor are co-defendants, actively participating in the defense of the original action, or where the indemnitor, with notice of the action, and of the indemnitee's request that he defend it, does not participate in the defense, but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them, both the indemnitor and indemnitee are bound under the findings necessary to a judgment in the action."

> "In the instant case there can be no question but what Pope and Talbot notified National of Crawford's and Lucibello's action against it by endeavoring to interplead National as a third party defendant. However, National took the position that under the Longshoremen's and Harbor Workers' Compensation Act, it could not be sued for contribution or indemnity. Although this view was mistaken as to the indemnity claim, the Court below sustained it and prior to the trial dismissed the petition to inplead National. National, therefore, so far as it could know, was

> under no duty to participate in the defense of the actions against Pope and Talbot. We conclude that National cannot be bound by any of the findings made in the litigations between Crawford and Lucibello, and Pope and Talbot. Compare the strikingly similar situations in George A. Fuller Co. v. Otis Elevator Company, supra. (This case is 245 U.S. 489.) Should Pope and Talbot now press its claim for indemnity against National it will be open to National to establish that Pope and Talbot was erroneously held liable to Crawford and Lucibello, and that therefore Pope and Talbot may not claim indemnity from this judgment. We think it must follow that if National is free to relitigate all of the facts of the situation at bar, Pope and Talbot cannot be bound by these present findings as to these same facts."

Certainly in this case, too, Bedal would be free to relitigate all of the facts in the case, and submit those facts to a jury. This the trial court refused to do. (It should be pointed out that in the above case the Third Circuit Court followed the rules set forth in the Restatement of the Law of Judgments, Sec. 106, 107 (a), and particularly Comment 3 of the Re-Statement.)

Bedal affirmatively contends that the trial Court was in error in directing a verdict in favor of the Lumber Company. Bedal had the right to have the following questions submitted to the Jury:

1. Whether or not Powell should recover a verdict against the Union Pacific Railroad Company based upon the Railroad Company's negligence.

2. Assuming that the Railroad Company was negligent, were the facts submitted in the suit by the Lumber Company against Bedal such as to show that Bedal, too, was negligent, and that his negligence was a concurring and proximate cause of Powell's injury?

3. If the jury did hold that Bedal's negligence was a concurring and proximate cause, was the Union Pacific Railroad Company a tort-feasor, which would preclude it from contribution from Bedal, and in turn its subrogee, the Lumber Company, from such contribution?

4. Assuming that the Union Pacific Railroad Company was not a concurrent or joint tort feasor, nevertheless was Bedal the party primarily negligent as opposed to the Railroad's "passive" negligence?

All of these questions were questions that Bedal had a right to have a jury answer.

After all, before an indemnitor can be bound by a prior judgment, to which it was not a party, the indemnitee must show that the indemnitor had a real, and not a fictitious opportunity to appear and defend the prior lawsuit. The indemnitor would have the right to conduct the whole litigation, the right to appeal, and the right to prosecute a defense without the interference of any party to the lawsuit. This the Lumber Company could not give Bedal, because it did not have those rights to give away. See *Robb v. Security Trust Company,* 121 Fed. 460, Third Circuit.

Appellant would also like to call attention of the Court to: *Cofax Corporation v. Minnesota Mining and Manufacturing Co.,* 79 Fed. Sup. 842 (S. D. N. Y.) 1947.

Section 96, Restatement of the Law of Judgments, Sub-Section 2.[7]

The *Cofax* case illustrates the close relationship that may exist between parties, and still not bind them to a judgment to which one of them was not a party. No such relationship exists in the case at hand.

BEDAL'S NEGLIGENCE, IF ANY, WAS NOT IN ISSUE IN THE POWELL CASE NOR WAS IT PASSED UPON.

Actually, even if Bedal was given notice, and an opportunity to defend, still Bedal could only be bound by the facts *actually* litigated in the first case.

42 Corpus Juris Secundum, Sec. 32, Comment (c), page 617, states the general rule as follows:

> "The former adjudication is not conclusive as to the indemnitor's liability, unless such fact was necessarily involved in the issues and litigated and determined in the former action, * * *."

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[7] "A person who is not a party to an action, who is not represented in it, and who does not participate in it, is entitled to an opportunity to litigate its rights and liabilities. Where an action is brought first against the one secondarily liable there is ordinarily no reason for an exception to the ordinary rule of mutuality, and hence, since it is clear that the person primarily liable should not be bound by an action in which he does not participate, and in which he is not represented, there is ordinarily no reason for binding the unsuccessful claimant in the subsequent action." (Section 96(2), Restatement, Judgments.

So even assuming that all of the proper requisites had been given, what was adjudicated in the former action? Before we answer this question, Bedal thinks it important to re-examine once again the case of *Washington Gas Light Company v. District of Columbia,* supra. It will be recalled in that case that the Gaslight Company was being sued by the District of Columbia on the theory of primary negligence, after the District had responded in judgment to a woman by the name of Parker, who fell in a hole in the sidewalk, created by the gas company. The Supreme Court pointed out that in examining the records of the first case, there was no evidence that the District of Columbia had actual notice of the defective condition, but that this liability rested on the fact that since the defect existed over some period of time, the city had constructive notice of its existence. This would mean that the city was certainly a passive wrongdoer. In the first litigation the gas company's negligence was also at issue, since it was necessary to show that the gas company created the defective condition. The Circuit Court distinguished this case from an earlier decision. *Chicago v. Robbins,* 67 U.S. 298, 17 L.Ed. 298. In the latter case there was a similar defect in a street, but there the City of Chicago had actual instead of implied notice of the defect and as the Supreme Court said in the *Gaslight* case "that in that case (*Chicago v. Robbins*), the liability of the city rested on actual notice of the defect in the street, and not on implied negligence based on the continued existence of the

defect which caused the injury; therefore, the essential fact upon which the judgment against the city rested did not, as a legal consequence, imply negligence on the part of Robbins. Here, of course, a different set of facts give rise to a different result."

Thus in the former case of *Chicago v. Robbins* supra a question for the jury was presented and that was whether or not Robbins, the supposed indemnitor, was negligent. Certainly, in examining the transcript in the *Powell* case, one must come to the inescapable conclusion that the Railroad could be and in fact was adjudged negligent on the basis of facts in that case that would not involve a determination of Bedal's negligence at all.

In the original case of A. M. Powell v. Union Pacific Railroad Company therew as no evidence presented whatsoever that any employee of Bedal, or Bedal himself, was negligent in cutting the logs in the forest, or negligent in the loading of them on the truck, or negligent in driving the truck to the place where they were dumped. There was no evidence in the case whatsoever that the logs were dumped precariously or in a manner in which they had previously not been handled or in a manner different from logging operations generally. The only evidence that existed in that case concerning Powell's accident was that as the logs tumbled from the truck down a steep incline to the bunker, a slab flew off the log. An accident occurred. The affirmative evidence shows, from every witness, including Powell himself, that such a

thing had never happened before. (See R. 206, 218, and p. 62 of the original Transcript, Exhibit 7.)

It is clear from the examination of both Exhibit 7 and the record in this case that the logs were being unloaded exactly the same way as they had been for months and years before. (P. 62 of Exhibit 7; R. 205, 207, 208, 218 and 231.)

Unquestionably the Union Pacific Railroad Company had *actual* knowledge of the way the logs were being unloaded. Thus the issue framed in the first case was whether or not considering the facts that logs were being unloaded, did the Union Pacific Railroad Company provide its employee, Powell, with a safe place to work. The question of Bedal's negligence was not and could not be at issue. Furthermore, as we will point out later, there is no evidence whatsoever to show that Bedal was negligent, even in the first case. Consequently, Bedal had a right to submit the question of his negligence to the jury, even assuming he was bound by the first case, which he was not. The Supreme Court of the United States, in the two cases just discussed, made this distinction, and pointed out that where independent grounds of negligence existed against the indemnitee, the indemnitor was allowed to show that his actions were not responsible for the original injury complained of.

THE EVIDENCE IN THIS CASE CONCLUSIVELY SHOWS THAT BEDAL WAS NOT NEGLIGENT, AND FURTHER THAT THE UNION PACIFIC RAILROAD COMPANY'S NEGLIGENCE, IF ANY, WAS ACTIVE NEGLIGENCE, AND WAS THE SOLE AND PROXIMATE CAUSE FOR POWELL'S INJURY.

The trial Court erred in failing to grant appellant's motion to dismiss the third party complaint and to direct the jury to return a verdict in his favor. (R. 242.)

Bedal would like at this time to examine briefly the evidence in the case. Bedal will examine not only the testimony adduced in the action between the Lumber Company and Bedal, but also the testimony established in the case of Powell v. Union Pacific Railroad Company. (Lumber Company's Exhibit No. 7.) The testimony conclusively shows that if there was negligence, the only negligence that existed, or could be found, was that of the Union Pacific Railroad Company.

In the original action Powell established that the bunkers were filled with debris, causing logs that were rolled down the hill to jump over the bunker, and on occasions strike the railroad cars. But it became clear from the testimony that the fact debris existed in the bunker had absolutely nothing to do with the slab breaking off the log. The only people who saw the slab break off the log testified that it broke as the log was rolling down the hill and the slab came off prior to the time the log had reached the bunker. (R. 217, 221, 226, 231, 232.)

Even in the Findings of Fact and Conclusions of Law, (R. 92), submitted by the Railroad Company,

it is not contended that the debris in the bunker had anything to do with the slab breaking off the log. The Court itself recognized this in its statement to the jury, directing a verdict in favor of the Lumber Company. (R. 249.)

From the evidence adduced at both trials we feel that the trial Court's comments to the jury (pp. 248, 255), have no foundation in fact. We would like to take these points up in order:

There was no evidence that Bedal was negligent in handling his logs. This evidence was not presented in the first case and was not at issue. There were no instructions submitted in the first case which asked the jury to find that Bedal was negligent in unloading logs. (See Instruction, Plaintiff's Exhibit 7, p. 182, et seq.) The only evidence that appears in that case, or this one, is that the Lumber Company had been unloading the logs in this manner for a long time prior to the accident of September 15, 1949.

The trial Court claimed in its charge to the jury that the logs were rolled down a steep incline, a distance of 20 feet or more. The evidence in the cases show that the distance was more than 20 feet, in fact a distance of 47 feet. (R. 164.) Also the height of the roadway from which the logs were dumped above the railroad track was 18.7 feet. (R. 172.) The logs that were being unloaded was an average load of logs. (Plaintiff's Exhibit 7, page 55.) The distance from the top of the logs on the bed of the truck to the bottom of the wheels of the truck from which the logs

obviously would have to fall in any location was a total distance of 12 feet. (Plaintiff's Exhibit 7, page 64; R. 232.) The logs when they were pushed off the truck with a caterpillar tractor, hit the ground with considerable force, and rolled down the hill to the bunker. Powell and three other employees always went north of where the logs were being unloaded to avoid being hit by bark and to be in a safe place. (R. 216, 184; p. 62 of Cross-complainant's Exhibit 7; p. 73 of the same Exhibit.) None of these facts create an inference of negligence against anyone.

The Judge did not, as he stated, submit in the first case the question of whether or not it was negligent to unload the logs down the steep incline, but submitted, rather, the question of whether the Railroad Company provided Powell with a safe place to work. (R. 249, Cross-complainant's Exhibit 7, p. 186, 187.)

As pointed out before in this brief, the undisputable evidence is that a slab of this kind, a piece of timber such as this, weighing 60 or 70 pounds, had never been known to have broken off a log and traveled that distance before.

It was under these facts that the trial Court says that Bedal had to be adjudged negligent in the first action. We feel just the opposite. We feel these facts are not sufficient to show that Bedal was negligent at all in any action. What may we ask the Court could Bedal have done that he did not do? Wherein did his negligence lie? What was unreasonable about the method in which the logs were unloaded? There is no

evidence that the logs were unloaded in a manner not consistent with normal logging operations. Certainly there is always going to be a certain amount of risk in any logging operation when logs the size of these are loaded and unloaded. There is not even any evidence contained in either the record or cross-complainant's Exhibit 7 that any of Bedal's employees handling the actual unloading process knew that Powell was within 60 or 70 feet of the place of unloading, or knew that there was a splinter in the load, or had reason to know that a slab might fly off. There was no evidence in the *Powell* case, or this one, of that fact, because there was no need to present that evidence. The Railroad Company was adjudged negligent in failing to provide a safe place to work. After all, the Railroad had sole control over its employee, Powell. There is no evidence that Bedal had any, or that he could tell Powell where to be, or where not to be. Perfectly normal operations can create danger to people if they get in the way of these operations. For example, it would be dangerous to stand right below these logs as they were being unloaded, or it would be dangerous to look into a dynamite hole when a dynamite cap was being exploded. Any number of situations can be dangerous. If there was any negligence at all, and this too, we honestly doubt, it was in the Railroads failing to have someone available to tell Powell to get further down the track, or to provide a safe place for people to stand while these logs were being unloaded, and be protected under such circumstances. Thus, we

say that from the evidence presented it conclusively shows that under no stretch of the imagination does one scintilla of evidence appear that Bedal was negligent. And as a result, the motion for a directed verdict for appellant should have been granted by the trial Court.

SINCE THE RAILROAD ACQUIESCED IN THE MANNER THE LOGS WERE UNLOADED, IT WAS A JOINT TORT-FEASOR AND THERE CAN BE NO CONTRIBUTION OR INDEMNITY BETWEEN JOINT TORT-FEASORS OR THEIR SUBROGEES.

If the act of unloading logs was dangerous, the Railroad most certainly knew it, and acquiesced in it. Powell himself stated in the first action that the logging operation had been performed that way for a long time. (Cross complainant's Exhibit 7, p. 62.) The Lumber Company employee, Howard Sage, stated that he had watched this kind of unloading hundreds of times, and "I had never noticed anything like this, no, sir." (R. 231.) Charles Ritter said logs were handled the same way prior to the accident. (R. 218.) Harry Hansen said that the logging operation was the same method of unloading that had been employed since May, 1949. (R. 208. Also see R. 207.) U. R. Armstrong testified that Banks Landing consisted of the hill, a road on top, and that this topography had existed for a long time *prior* to the time the contract with Bedal was entered into. (R. 240.) There can be no question but what the Railroad had actual notice of the method of unloading logs. Both its car inspector, Powell, and Russell Eldridge, the Station

Agent for the Railroad at Banks, Idaho, were thoroughly familiar with the method of unloading.

Russell Eldridge used to go down by the track where the unloading was done about once a day. He testified he was conversant with the bunkers. He testified that the debris and material filled up behind the bunkers every year. (Pp. 80, 87 plaintiff's Exhibit No. 7.)

If this situation was dangerous to the Railroad's employees it was wholly within the province of the Railroad Company to correct. There was nothing hidden about the fact that logs were rolling down a hill. What happened every day at Banks, Idaho, was something quite different from the multitude of happenings in which a passive wrongdoer is in the end absolved from all blame. The cases which the respondent will undoubtedly rely upon are those cases in which a city, for example, recovers from a contractor because of a hidden defect in its streets or on its sidewalks. This was the situation in the *Washington Gaslight Company v. District of Columbia,* supra. There the city had actual knowledge of the hole in the sidewalk. How different it is then when the one adjudged negligent by a jury has full knowledge day by day of all of the surrounding circumstances which eventually resulted in injury to Powell.[8]

Apparently, the only person of all of those men waiting for the logs to be dumped that was *not* watch-

[8]Though Bedal must admit that even the evidence of negligence against the Railroad was negligible at most.

ing the unloading operation was Powell himself. But assuming there was negligence, as the prior jury must have assumed, then the negligence had to be that of the Railroad in not giving Powell and not requiring Powell to be in a safe place while he was working. Knowing what it did know about the unloading operation, the Railroad Company actively participated in the injury sustained by Powell. There is absolutely no evidence to the contrary, either in the record before this Court or in the transcript submitted by cross-complainant, to show that the Railroad did not know of the situation that existed at the time Powell was injured. Every single item and every event that occurred on the day of the Powell injury occurred on the day before and the day before that for months past. If a Court could conclude from the evidence that Bedal's method of unloading was dangerous then most certainly the least that the railroad did was to acquiesce in it.[9] By acquiescing in it, it became an active wrongdoer. An active wrongdoer who is adjudged negligent has no right of contribution from another. Since the Lumber Company indemnified the Railroad by reason of its contract to hold the Railroad harmless even for its own negligence, it being the insurer, can stand in no better position than the Railroad, its insured.[10] Bedal contends then as a mat-

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[9]Powell alleged in his complaint that the Railroad had actual knowledge of the manner in which the logs were unloaded. (R. 129, para. IV.)

[10]Bedal would not be bound by the judgment against Powell, since he did not have notice, nor was he a party to that action,

ter of law that the Railroad Company was an active joint tort feasor and could not recover against Bedal directly. Since the Railroad could not do so, neither can the Lumber Company.

The Restatement of the Law of Restitution, Section 102, Chapter 3, Page 429, provides as follows:

> "Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both became liable in tort to the person, one of them who has made expenditures in the discharge of their liability is not entitled to contribution from the other."

Taylor v. J. A. Jones Construction Co., 141 SE 492 (N.C.) (1928);

Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co., 52 NE 2d 340 (Ohio);

City of Lewiston v. Isaman, 19 Idaho 653, 115 P. 494, 499;

Fidelity and Casualty Co. of N. Y. v. Federal Express, 136 Fed. 2d 35 (6th Cir. 1943);

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nor given an opportunity to defend that action by any person. However, the Railroad and the Lumber Company are both bound and concluded as to all facts established against the Railroad in the earlier action, and if the judgment in the earlier action rested on a fact fatal to recovery in an action over against the indemnitor, the later action against the indemnitor may not be successfully maintained.

American Surety Co. v. Singer Sewing Machine Co., 18 Fed. Sup. 750, 753.

Since the Lumber Company was required to pay the Railroad because of its contract of indemnity, the Lumber Company would be in the position of a subrogee. A subrogee or insurer stands in the same shoes as does the party he insures or indemnifies.

Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co., 52 N.E. 2d 340, 344 (Ohio).

Atlanta Consolidated Street Ry. Co. v. Southern Bell Tel. & Tel. Co., 107 F. 874 (Cir.Ct. ND. Ga.);

Booth-Kelly Lumber Co. v. The Southern Pacific Co., 183 F. 2d 902 (9th Cir.).

Section 95 of the Restatement of Law of Restitution, Chapter 3, Page 415, provides as follows:

> "Person Responsible for a Dangerous Condition:
> "Where a person has become liable with another for harm caused to a third person because his negligent failure to make safe a dangerous condition of lands or chattels, which was created by the misconduct of the other, or which, as between the two it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability *unless after discovery of the danger, he acquiesced in the continuation of the condition.*" (Italics ours.)

The editors of the Restatement elaborate on what they mean by acquiesce in the "continuation of the condition" in the comment following the principal rule.

> "In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable. On the other hand, if the condition was such as to create a grave risk or serious harm to third persons, or their property, and the payor was, or from his knowledge of the facts should have

been aware that such a risk existed, his failure to make the condition safe is reckless, and he is not entitled to restitution."

A number of courts[10a] have construed this provision in the Restatement. Other courts, while not expressly referring to the Restatement of the Law of Restitution, Section 95, supra, have arrived at the same result. In each case acquiescence in a dangerous condition has resulted in a Court holding that the person who knew of the dangerous condition was a joint tort feasor and could not recover from the person responsible for the existence of that same condition.

In *Stabile v. Vitullo,* 112 N.Y. Sup. 2d 693, a stairway was damaged through the negligence of a third party. The building owner failed to repair it, though he knew of the damage for a period of four and one-half months prior to the accident. The Court held that he "knowingly permitted and acquiesced in the continuation of the condition until plaintiff met her injury."

A seaman's employer was held negligent where it or its employees knew that a ship's ladder was dangerous, even though the dangerous condition resulted from the act of a third party. Accordingly, in *Spaulding v. Parry Navigation Co.,* 90 Fed.Sup. 564 (U.S. D.C. S.D. N.Y.) contribution was denied, even though

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[10a]See discussion of *Booth-Kelly Lumber Co. v. The Southern Pacific Co.,* 183 F. 2d 902, which appears in the Appendix. In that case, this Court examined many of the principles of law applicable here.

the Todds Shipyards Corp., a third party defendant, placed the ladder against the ship and controlled the ladder which proved to be defective and on which the seaman was injured. The New York Federal Court specifically quoted the provision from the Restatement of Restitution 95, supra, and held that the facts in that case which were submitted to the jury, and the jury's answer to specific questions submitted to it, showed that the employer of the injured seaman acquiesced in the dangerous condition of the ladder.

A New York Appellate Court held that an owner who fails to repair a fence, knocked down by the negligence of a third party, was a joint tort feasor where that owner knew of the dangerous condition. The Court quoted the principle taken from the Restatement of the Law of Restitution, Section 95, and said as follows:

> "But, after the breaking down of the wire fence there was abandonment by both of the hazardous wire on the loose, and, moreover, to the factual or presumed knowledge of Crystal, the dangerous status quo was permitted to remain for more than two working days, until Mrs. Falk's feet became entangled with the wire on the sidewalk. With notice of the condition the owner here not only did nothing, but knowingly permitted it to remain. The duty of the owner not to create danger, and the duty not knowingly to permit it to continue, normally and morally imposed equal liability." See p. 70.
>
> *Falk v. Crystall Hall, Inc.,* 105 N.Y. Supp. 2066.

A similar result was reached in *Standard Accident Insurance Co. v. Sanco Piece Dye Works,* 64 N.Y. Sup. 2d 585. In this case the owner of the premises knew that Sanco was negligently letting steam out through a window across a driveway on which the plaintiff in the action was injured. The owner of the premises was a co-defendant, and he sought indemnity from Sanco. Sanco was in full control of the steam. Because of the steam shooting across the driveway, the plaintiff was forced to drive around it and in doing so collided with another car. The Court held that the parties were *in pari delicto* since the owner, Garnerville, knew of the dangerous condition and acquiesced in it. Again, in *Taylor v. J. A. Jones Construction Co.,* supra (141 SE 492) (NC), the employee successfully sued the Jones Construction Co., which was trying to get full contribution from one Marcum, an independent contractor. Marcum was under contract to put the steel in an office building that was to be ten stories high. Marcum raised certain steel negligently and a large beam fell from above striking the plaintiff workman. Jones Construction Co. was charged with negligence in failing to provide the employee with a reasonably safe place to work. The Supreme Court of North Carolina held that the evidence showed that the employer knew of the danger and acquiesced in it. Thus he was a joint tort feasor and he could not receive contribution under those circumstances.

The Restatement of the Law of Restitution has been recently applied in *Massachusetts Bonding &*

Insurance Co. v. Dingle-Clark Co., 52 N.E. 2d 340 (Ohio). In this case an employee by the name of Henzi worked for a sub-contractor of a steel company. The steel company was the *assured* of the plaintiff bonding and insurance company. Certain construction work was undertaken at the steel company's plant. A moving company while working at the plant removed some barricades from around a hole in the floor of the building. The barricades were not replaced. Dingle-Clark was a subcontractor of the steel company who in turn had subcontracted to the party which moved the barricade. At the trial, the steel company was adjudged negligent for failing to provide good lighting *and* for failing to provide barricades around the hole. The barricades had been removed three days prior to Henzi's injury. The Ohio Supreme Court held that the steel company had acquiesced in the dangerous condition created by the subcontractor who removed the barricade. The acquiescence was charged to the steel company because three whole days had elapsed since the barricades were taken down. The steel company, being a joint tort feasor, was precluded from recovering contribution from its subcontractor, Dingle-Clark Co., who was responsible for the action of the party that removed the barricade. The Ohio Supreme Court also noted that the insurance company stood in the same shoes as the steel company in attempting to get contribution from the defendant. And in our case, too, the Lumber Company would stand in the same shoes as the Railroad Company and it would be bound by the fact that

the Railroad was a joint tort feasor and precluded from contribution.

Bedal would like to *reiterate* that the records of both trials conclusively show that the railroad had knowledge of all the conditions and circumstances surrounding the unloading of logs at Banks, Idaho. The conditions that surrounded Powell's employment were such that the company had a duty to provide him with a safe place to work. The jury in the Powell case did not decide that the splinter which flew off the log was the result of any negligent acts of Bedal's employees. There is not one scintilla of evidence which shows that Bedal or his employees were negligent in preparing the logs or cutting the logs prior to the time they were unloaded. The jury held in the first action that the Railroad was negligent for failing to provide a safe place for its employee, Powell, to work, considering the pre-existing conditions of which it had full knowledge. But the trial Court not only failed to grant Bedal's motion for a nonsuit, but it even failed to submit the question to the jury as to whether or not the Railroad participated in the tort and was a joint tort feasor. This, too, is reversible error.

IN A MOTION FOR A DIRECTED VERDICT, ALL REASONABLE INFERENCES ARE DRAWN IN FAVOR OF THE PARTY AGAINST WHOM THE MOTION IS MADE.

Bedal did not have a chance to get his case to the jury. The Trial Court decided that (a) Bedal was adjudged negligent as a matter of law in the Powell

case, (b) that Bedal's negligence was the primary cause for Powell's injuries, (c) that the Union Pacific Railroad did not acquiesce in any dangerous condition, (d) that this Railroad's negligence was passive, not active, (e) that Bedal's logging contract was an indemnity agreement and (f) that Bedal was asked to defend the Powell case by the Railroad.

Appellants contend that there is no evidence to support any of these findings, much less evidence that shows as a matter of law the propositions the trial court must have found to be true when it directed a verdict against Bedal.

The District Judge ignored the multitude of Idaho cases which construe a motion for a directed verdict against the party making the motion. Appellants need not spend time here discussing the well known principles of law surrounding the proper use of the directed verdict, although the following cases are called to the Court's attention:

Hobbs v. Union Pac. R. Co., 62 I. 58, 108 P. 2d 841;

Hayward v. Yost, 72 I. 415, 242 P. 2d 971;

Carson v. Talbot, 64 I. 198, 129 P. 2d 901;

Stearns v. Graves, 62 I. 312, 111 P. 2d 882;

Allan v. Oregon Short Line R. Co., 60 I. 267, 90 P. 2d 707;

McCornick and Co., Bankers v. Tolmie Bros., 42 I. 1, 243 P. 355;

Smith v. Manley, 39 I. 779, 230 P. 769;

Hendrix v. City of Twin Falls, 54 I. 130, 29 P. 2d 352;

Servel v. Corbett, 49 I. 536, 290 P. 200.

THE CONTRACT BETWEEN BEDAL AND LUMBER COMPANY DOES NOT INDEMNIFY THE LUMBER COMPANY AGAINST DAMAGES IT SUSTAINED BY REASON OF THE NEGLIGENCE OF THE RAILROAD COMPANY.

The logging contract between Bedal and the Lumber Company is attached to cross-complainant's complaint as Exhibit B. (R. 27.) The Lumber Company contends that this is a contract of indemnity.[11]

It can be seen from this long contract, together with the amendments to the contract, that the Lumber Company and Bedal were primarily concerned with log hauling from the forest to the Railroad cars at Banks, Idaho. Bedal's job was to cut, skid, haul and deliver to the Railroad at Banks, Idaho, and load on Railroad cars all the timber the Lumber Company had purchased from the United States Forest Service in certain areas in Southwestern Idaho. It is from this long contract that the Lumber Company has singled out two phrases appearing in different places in the contract from which it contends Bedal agreed to indemnify the Lumber Company for the negligence of the Railroad. These two paragraphs are set out here as follows, in full:

> "It is further stipulated and agreed that under no circumstances or conditions in the party of the first part to become liable for any claims whatsoever which may be incurred by the parties of the second part or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be

[11]The Lumber Company never argued this position too seriously and, in fact, counsel for the Lumber Company did not even mention it in his motion for a directed verdict. (R. 245, 247.)

considered as a partnership agreement, nor shall the parties of the second part be considered by this contract, or any interpretation thereof, to be the agents of the first party, and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement."

"Second parties further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party, in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use, and will at their own expense provide each truck with all equipment for safe operation and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof."

To make these two paragraphs mean what the Lumber Company would like the Court to make them mean would be to distort the plain meaning of words. The first paragraph that we quoted is an attempt by the Lumber Company to make clear to Bedal that he is an independent contractor and in addition to make clear to everyone else that Bedal is an independent contractor and that the Lumber Company is not to become liable for any of the claims against Bedal

because of the action of any of Bedal's servants. Traditionally, an independent contractor, and he alone, would be responsible for the action of his servants.[12] The Lumber Company wished to make this clear. It wished to show the world that neither Bedal, or his employees, were its agents or servants. Actually Bedal and his employees have not incurred any "claims whatsoever" in the carrying out of the contract. It is *now* that the Lumber Company is asking Bedal to incur a claim. The claim that it wants it to pay is the one the Railroad held the Lumber Company responsible for. It does not say in that paragraph that Bedal is to be liable because the Lumber Company contracted in its lease with the Railroad to indemnify the Railroad against its own negligence. It does not say that Bedal is to become liable for a claim that a jury stated the Union Pacific Railroad Company was responsible for. The Lumber Company did not become liable to the Railroads because of any claim incurred by Bedal. That much is true.

In the second part of this long contract, Bedal agreed to carry liability insurance on the trucks and to name the Lumber Company as a party insured. This was to protect the Lumber Company in the event some party sued Bedal or the Lumber Company because of the negligent operation of a truck. First of all, an agreement to carry insurance is not an agreement to indemnify. Secondly, there has been no litigation in which Bedal has been adjudged negligent

[12]27 *Am. Jur.* 504, Sec. 27.

in the operation of a truck. It is only when one of his drivers has been adjudged negligent in driving a truck, that the Lumber Company could claim damages. But it was not from any of these things that the Lumber Company was held responsible to the Railroad. Again, as stated in the preceding paragraph, it was because the Lumber Company agreed by contract, of its own volition, to indemnify the Railroad against its own negligence. We will discuss this whole question of the Court's ruling in the Railroads' case against the Lumber Company in a subsequent section. But suffice it to say at this point that it was the Court's ruling that the reason the Railroad Company recovered against the Lumber Company was because of the fortuitous provision in its lease.

When a person seeks indemnity, he does not seek contribution. He seeks full complete reimbursement. He seeks reimbursement, not only for specific damages, but for all expenses and attorneys' fees that may have been incurred as a result of the failure of a third party to reply in indemnity, either express or implied. *Crawford v. Pope and Talbot, Inc.,* 206 Fed. 2d 784. When one indemnifies there is a total shifting of economic loss to the party chiefly or primarily responsible for that loss, either because of the latter's contract or because of an operation of law. *Smart, et al. v. Marard, et al.,* 124 N.Y. Sup. 2d 634. It is because of the nature of indemnity that a contract which is not specifically an indemnity contract is always strictly construed in favor of the indemnitor.

Bedal does not feel that this particular contract requires strict construction in order to sustain a finding in favor of Bedal. Certainly, there is nothing in the provisions just quoted that makes Bedal liable for the Lumber Company's contractual obligation. This has nothing to do whatsoever with the carrying of public liability insurance. The carrying or not carrying of such insurance is not an agreement to indemnify. This is particularly true when there has never been a set of circumstances arise from which it could be ascertained that Bedal or one of his employees was negligent in the operation of the trucks. Certainly, not even the Lumber Company contends it—the Lumber Company—was negligent in any way in either of the two cases. Nevertheless, Bedal will quote several principles of law and the authorities for those principles and point out to the Court that an agreement to carry liability insurance has not been construed as being an agreement to indemnify.

A CONTRACT WILL NOT BE CONSTRUED AS ONE FOR INDEMNITY, PARTICULARLY AGAINST ANOTHER'S OWN NEGLIGENCE, UNLESS SUCH A CONSTRUCTION IS REQUIRED BY CLEAR, EXPLICIT AND UNEQUIVOCAL LANGUAGE IN THE CONTRACT.

This general principle of law has been applied almost universally by the Courts. This principle is not applied when an insurance company writes an indemnity policy. Of course, in those cases it is the business of the insurance company to write such a policy. But it is *not* the business of Bedal, a logging

contractor, to act as an insurance company or indemnitor. The Fifth Circuit Court of Appeals in *Employers Casualty Co. v. Howard P. Foley Co., Inc.*, 158 Fed. 2d 363, 364, observed:

> "* * * It is certainly the general rule that, where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium, and where indemnity is the principal purpose of the contract; but from one not in the indemnity business and as an incident of the contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."

In this case the Court was construing the following provision of the lease:

> "(2) Lessee hereby releases Lessor from any and all damages to both person and property and will hold the Lessor harmless from all such damages during the term of this lease."

The Court examined the latter part of the above lease provision and held that the covenant was not specific enough to be a covenant of indemnity. That being the case, the provision was construed in favor of the indemnitor. There are many cases in which this principle of law has been repeated and in which the Courts have held that contracts should not be construed as indemnity agreements unless the terms of the contract clearly require such an interpretation.

See *Southern Railway Co. v. Coca Cola Bottling Co.*, 145 Fed. 2d 304, 307 (4th Cir.); *Sinclair Prairie*

Oil Co. v. Thornley, 127 Fed. 2d 128 (10th Cir.); *Kay v. Pennsylvania Railway Co.,* 103 NE 2d 751 (Ohio); *Employer Liability Assurance Corp. v. Post & McCord, Inc.,* 36 NE 2d 135, 139; *Halliburton Oilwell Cementing Co., et al. v. Paulk, et al.,* 180 Fed. 2d 79, 83, 84.

In *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corporation,* 70 NE 2d 604 (Ill.), a contractor agreed to provide and pay compensation for injuries sustained by any of its employees arising out of or in the course of the employment within the building where the contractor was working. Further, the contractor "* * * agreed to carry insurance in a company satisfactory to the owner fully protecting himself, the architects and engineers, the consulting engineer and the owner against claims which may be made under said laws, and agreed to deposit said policy (or a true copy thereof) or a certificate from the insurance company issuing said policy, showing insurance in force with the architects and engineers. * * *". In addition, the contractor, which was Westinghouse, agreed to indemnify the owner on account of any of the negligence of the contractor's employees. In this case an employee of Westinghouse was killed when an elevator slipped and fell on top of him. Westinghouse was suing the LaSalle Monroe Building Corporation to recover the money it paid the employee because of his death. The building corporation put up these contract provisions with Westinghouse as a defense. The Illinois Court held it was no defense and that the agreement to carry such insurance was not an

indemnity provision, stating that such a holding "would impose on the contractor the duty to indemnify against injuries entirely without his control, and such should not be adopted in the absence of clear language in the contract, including injuries arising from the negligence of appellant's own servants".

In *Sinclair Prairie Oil Co. v. Thornley,* supra, the Court of Appeals for the 10th Circuit held that an agreement to carry liability insurance in a contract between an oil company and an independent contractor who was to deepen a well for the plaintiff was not such a provision as could be construed as a contract for indemnity. In this latter case, not only did the independent contractor, a man named Engle, agree to carry workmen's compensation, employers' and public liability insurance, but he agreed to assume responsibility for "all such claims and to hold Sinclair free, clear and harmless therefrom". (See page 130.)

An employee of Engle's was killed when a well was being cleared out by a process connected with the lowering of a five inch pipe into a hole. There was sufficient evidence in that case to predicate negligence against Sinclair itself, since the superintendent knew that certain gas might come in contact with a burning stove. The Court also stated on page 133 as follows :

> "Sinclair interprets the provision of Engle's contract in which he agreed to carry Workmen's Compensation and to assume the responsibility for all such claims and to hold and save Sinclair free, clear and harmless therefrom, to mean that

Engle would become liable over to Sinclair for any liability attaching to it, even if such liability arose from its own negligence under any of the operations of either Engle or Haliburton. An indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract. Do-nut Machine Corp. v. Bibbey, 1st Cir., 65 Fed. 2d 643; North American Railway Construction Co. v. Cincinnati Traction Co., 7th Cir. 172 Fed. 214; Thompson-Starrett Co. Inc. v. Otis Elev. Co., 271 N.Y. 36, 2 N.E. 2d 35. Here the parties contracted for the deepening of a well. The contractor was required to carry various kinds of protective insurance. He then agreed to assume liability for all such claims, that is, claims for Workmen's Compensation, Employers' and Public Liability, and to hold the company free, clear and harmless from such claims. This is a provision generally found in such contracts, and the natural import thereof is that the contractor will so carry on his operations that no liability therefrom will attach to the other party. We can read nothing into the contract that would require Engle to indemnify Sinclair against liability from his own negligence, unless negligence on the part of Engle concurred with the negligence of Sinclair.

"Whether Engle was guilty of negligence which concurred with the negligence of Sinclair and proximately caused the injury raised a question of fact to be determined by the jury. While the question was not submitted to the jury in that form, it was indirectly submitted by submitting

> the question of whether Mr. Engle was liable to Thornley. The jury absolved Engle from liability to Thornley. Absolving him from negligence which would make him liable to Thornley, likewise absolved him from negligence concurring with that of Sinclair."

These two cases that have just been mentioned are cases in which the alleged indemnitee seeks to hold its independent contractor on grounds of actual negligence. It will be noted that in the case at hand the Lumber Company is trying to take the words in its contract with Bedal and so construe them as to protect the Lumber Company FROM ANY LOSS IT MIGHT SUSTAIN BY REASON OF ITS SEPARATE INDEPENDENT CONTRACT ARRANGEMENT WITH THE RAILROAD, whereby it indemnified the Railroad against its own negligence. Is there any mention in the logging contract of such an undertaking? Is it natural that Bedal would make such an agreement? Can the provisions just quoted from Bedal's contract indicate to anyone that Bedal agreed to indemnify the Lumber Company at all? The only liability that could attach to Bedal by virtue of his agreement to carry insurance would be that in the event the Lumber Company was adjudged negligent by a Court or jury because of the negligence of one of the truck drivers of Bedal, then the Lumber Company would be entitled to have insurance protection. There can be no way in which a reasonable person could construe these provisions as imposing on Bedal the duty and obligation of a general indemnitor.

A contract should be interpreted so to arrive at the intent of the parties and give a contract its ordinary meaning. An agreement to carry liability insurance is not an agreement to indemnify, particularly where there has been no action taken which would activate such insurance. The distinction between the two can be noted in *Burks v. Aldridge,* 121 P. 2d 276, 280 (Kans.). Actually the principal grounds upon which the Lumber Company has always relied has been that there is an implied in law obligation on the part of Bedal to indemnify the Lumber Company.

STATEMENT OF FACTS II.

This is an appeal from the judgment of the Federal District Court for the District of Idaho, in which the Court awarded damages in favor of the Oregon Short Line Railroad Company and the Union Pacific Railroad Company, and against The Hallack and Howard Lumber Company, a corporation. (R. 103, 104.)

Bedal will present a second Statement of Facts and Argument without repeating what was included in the first Statement of Facts, the First Argument, Statement of the Case, or Specifications of Error, unless absolutely necessary. Appellant will not repeat here the Statement of the case or the Specifications of Error since they have been adequately covered heretofore.

Bedal answered the complaint of the Railroads against the Lumber Company. (R. 72.) Bedal admitted the execution and delivery of the lease, Plaintiff's Exhibit A, and the fact that the lease was in full force and effect on September 15, 1949. The special and affirmative defenses of Bedal to the Railroad's complaint were stricken by the order of the Court dated September 15, 1953. (R. 89.) Only the affirmative defenses were stricken, not the answer.

The complaint of *The Hallack and Howard Lumber Company v. W. O. Bedal* was based upon the possibility of the recovery of a judgment by the Union Pacific Railroad Company and the Oregon Short Line Railroad Company against the Lumber Company. (R. 19, 22.)

On March 3, 1954, the Oregon Short Line Railroad Company leased certain of its ground located on its right-of-way, to The Hallack and Howard Lumber Company. (R. 8, 13.) A map showing the leased area in yellow is attached to the lease agreement (Exh. A), and can be seen in the record at page 13. The consideration for the lease was the payment to the Oregon Short Line Railroad Company of $55.00 per year. (R. 10.) On November 16, 1948, the original lease was extended until February 28, 1954, by an extension rider. (R. 8.) It was agreed by the parties to the lease that the premises leased should be used for no other purpose than for log loading. (R. 10.)

The Railroad recovered a judgment against the Lumber Company by virtue of lease provision which

the trial Court construed as indemnifying the Railroad against its own negligence. This lease provision is Section 5, which provides as follows:

> "Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeiture or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

Another provision in the lease which actually provides for indemnity is Section 13. (R. 11.)[13]

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[13]"Section 13. It is understood by the parties hereto that the leased premises are in dangerous proximity to the tracks of the Lessor, and that by reason thereof, there will be constant danger of injury and damage by fire, and the Lessee accepts this lease subject to such danger.

"It is therefore agreed, as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumed all risk of loss, damage, or destruction of or to buildings or contents on the leased premises, and of or to other property brought thereon by the Lessee or by any other person with the knowledge or consent of the Lessee and of or to property in proximity to the leased premises when connected with or incidental to the occupation thereof, and any incidental loss or injury to the business of the Lessee, where such loss, damage, destruction or injury is occasioned by fire caused by, or resulting from the operation of the railroad of the Lessor, whether such fire be the result of defective engines, or of negli-

From the evidence adduced at the trial of this case and discussed in the Statement of Facts in the appeal of W. O. Bedal from the judgment against him by The Hallack and Howard Lumber Company, and from the statements contained in the Findings of Fact and Conclusions of Law (R. 92), as amended by order of the Court (R. 113), shows conclusively that The Hallack and Howard Lumber Company was not liable to the Railroad because of its negligence. That the Court found The Hallack and Howard Lumber Company was liable to the Railroad because of the contract alone is clearly seen in its statement to the jury on pages 254 and 255 of the Record.

The Railroad in its action against the Lumber Company admitted into evidence all relevant pleadings together with the transcript of the case of A. M. Powell v. Union Pacific Railroad Company. (Plaintiff's Exh. 2, R. 128, 154, Exh. 7.)

The leased property began about 6 feet from the west line of the railroad tracks at Banks, Idaho. (R. 168.) The bunker in front of the track was about 6 to 8 feet high. (R. 180.) The injured party, Powell, stepped from the top of an empty railroad car on the track, up about 2 feet to the bunker. (R. 182.) The

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gence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employee of the Lessor, or otherwise, and the Lessee hereby agrees to indemnify and hold harmless the Lessor from and against all liability, causes of action, claims or demands which any person may hereafter assert, have, claim or claim to have, arising out of or by reason of any such loss, damage, destruction or injury, including any claim, cause of action or demand which any insurer of such buildings or other property may at any time assert, or undertake to assert, against the lessor.'' (R. 11.)

very furtherest that the bumper logs were from the track was stated by Parrish to be about 3 or 4 feet. (R. 227.) It would appear then, that the bunker logs were just off the leased premises, being between the leased premises and the track. Logs were unloaded at this log loading site (which was the sole use of the premises contemplated by the lease agreement) (R. 110), for a long time prior to the time Powell was injured. Logs were unloaded in the usual manner on the date of his injury on September 15, 1949. (The transcript in the original Powell case, Plaintiff's Exh. 7, p. 62; also present Record, pp. 231, 218, 208, 207 and 240.)

ARGUMENT II.

THE TRIAL COURT ERRED IN DECIDING THAT SECTION 5 OF THE LEASE AGREEMENT BETWEEN THE RAILROADS AND THE LUMBER COMPANY INDEMNIFIED THE RAILROAD AGAINST ITS OWN NEGLIGENCE.

The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial Court erred in construing Section 5 of the lease agreement (R. 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad.

There are no cases in Idaho in which an indemnity agreement such as the one involved here has been construed by Courts of Idaho. It will be necessary in examining this agreement to refer to the general law as applied by other Courts.

Bedal would like to call the Court's attention to the principle stated heretofore in this brief, which is as follows:

> "A contract should not be construed as one for indemnity against another's own negligence, unless such a construction is required by clear, explicit and unequivocal language in the contract."

Bedal has cited in the prior ARGUMENT cases which sustain this principle of law. That this principle is sound cannot be questioned, especially when such a construction involves a contract between parties neither of which is an insurer, nor in the business of writing indemnity policies. In the case at hand, the Union Pacific Railroad Company, and the Oregon Short Line Railroad Company, made a business arrangement with The Hallack and Howard Lumber Company. The consideration was $55.00 a year for the rental or lease of a small piece of land. The primary purpose for the lease was to provide The Hallack and Howard Lumber Company with a log loading site. In fact the lease provided this was all the premises could be used for. (R. 10.) The Railroad benefited not only by reason of an annual rental—for a very small piece of ground—but in addition, of course, got more business for its Railroad.

As noted in the Statement of Facts the method and manner of unloading logs at this particular location was the same on the day of the accident as it had been for months, and indeed, years, prior to that time. The Railroad Company leased the premises as they were.

The slab that flew off the log and injured Powell was a strange and unheard of experience in the memories of all of those witnesses testifying at either the Powell trial or the present one. The lease agreement was the kind of contract that would contemplate logs being unloaded at that site. Powell, a car inspector for the Union Pacific Railroad Company, customarily worked along the track inspecting cars that were being loaded with logs. On the day of the accident, as the Statement of Facts in the first brief portion show, Powell walked 60 feet north from the approximate location the logs were being dumped. A slab hit him that flew off the logs as the logs were being rolled down the hill. He did not see the slab until it was 3 or 4 feet from him. Powell was standing at that time on top of a log bunker that was located approximately 3 or 4 feet from the railroad track. The edge of the leased premises was 6 feet from the railroad track. Thus Powell was not even standing upon the leased premises.

An independent contractor of the Lumber Company, Bedal was in charge of unloading the logs. The Hallack and Howard Lumber Company had no employee present at the scene except a man by the name of Sage who scaled the logs prior to their being loaded on the railroad car. The road way and slope that existed at the time of the Powell accident, also existed at the time the lease was entered into, as can be seen from the map. (Plaintiff's Exh. A, R. 13.) On the date of the accident the Railroad Company alone had con-

trol over Powell, its employee. There is no evidence that any other person had such control, nor is there any evidence that any other person knew that Powell was where he was at the time the logs were unloaded except those men standing by him. Under these facts —and we feel that these facts were indeed slim ones on which to base a judgment in the first place—Powell recovered $15,000.00, and the motion of the railroad for a judgment notwithstanding the verdict was denied by the trial Court.

The question is then, could the trial Court read section 5 of the lease agreement and decide that the Lumber Company was liable to the Railroad because of the Railroad's negligence. Bedal thinks not. Appellant feels that as a matter of law the lease agreement cannot be construed to indemnify the Railroad against its own negligence, particularly where there is no evidence or finding that The Hallack and Howard Lumber Company too was negligent. Let us examine some of the cases that have construed a general hold harmless agreement, such as the one we find in Section 5. In *Ocean Accident and Guarantee Co. v. Jensen,* 203 Fed. 2d 682 (8th Cir. 1953) an owner of a tavern leased his premises to the defendant, and a part of the lease provided as follows:

> "8. The Lessee shall keep said premises and operate his business therein, in a manner which shall be in compliance with all laws, rules and regulations, orders and ordinances of the City, County, State and Federal Government and any

> department of either and will not suffer or permit the premises to be used for any unlawful purpose, and he will protect the Lessor and save him and the said premises from any and all fines and penalties, and any and all damages and injuries that may result from or be due to any infractions of, or non-compliance with, the said laws, rules, regulations, orders and ordinances * * *".

The plaintiff insurance company was the insurer of the tavern owner and settled the case with two people who fell down the stairs of the tavern. They brought the suit against Jansen, the lessee. The stairs were one half inch narrower than those required by the city ordinance and there was no handrail present either. The handrail, too, was required by the city ordinance. The Federal Court stated the general rule as follows:

> "The rule is well established that indemnity agreements made between parties and under such circumstances as exist here, would not be construed to obligate the indemnitor to indemnify the indemnitee against claims or losses arising from the indemnitee's own negligence unless it clearly and unequivocably appears that such was the intention."

The Court put particular emphasis on the fact that the stairs were in the same condition when they were leased to Jansen as they were when the two people that fell down the stairs were injured. The Court felt that the lease did not clearly and unequivocably encompass losses occasioned by the negligence of the indemnitee.

In the case in front of *this* Court the Railroad leased the premises in the same general condition as it was on the date of Powell's injury. There is nowhere in Section 5 an unequivocable statement either (a) that the Lumber Company will be liable for the negligence of the Railroad, when it itself is not negligent, or, (b) that the Lumber Company specifically agreed to hold the Railroad harmless from negligence to its own employee. The word "employee" does not appear in Section 5, nor does the word "negligence" appear. Contrast with this section, section 13 of the lease. (R. 11.) In this latter section the Railroad wanted to make it clear that it wished to indemnify itself even against its own negligence. There the word "negligence" appears and The Hallack and Howard Company agreed, in case of fire or loss occasioned by the Railroad's negligence, to hold the Railroad harmless. The meaning of Section 13 is clear and explicit. In section 13, for example, it is clearly pointed out that as one of the material considerations for the lease, the lessee is to assume all loss to buildings on the leased premises, or to any other property resulting from the operation of the Railroad, whether such fire be the result of defective engines, or of "negligence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employee of the lessor, or otherwise, and the lessee hereby agrees to indemnify and hold harmless the lessor from and against all liability * * * by reason of any such loss, damage, destruction or injury * * *". The Railroad could have put such language in Section 5. It didn't.

Section 5 states that the Lumber Company agrees to use the leased premises for lawful purposes. There was no breach of this agreement. Then the lessee agreed to hold the lessor harmless from any damages, or judgments accruing by reason of the use or occupation of said premises. Does that language clearly and unequivocably state that the Hallack and Howard Lumber Company is to be liable for the Railroad's negligence? Does that language differ from the language used in a score of other cases where the indemnitor is not negligent and where the Courts hold the indemnitee has no right or cause of action against the indemnitor? Did the trial Court read that section and strictly construe the paragraph as the law requires? In *Kay v. Pennsylvania Railway Co.,* 103 N.E. 2d 751 (Ohio 1952), a railroad company entered into a switch track agreement with the Blanket Company. One of the railroad's employees was injured when his head struck an overhead draw bridge while riding on top of a freight car. The draw bridge was constructed by the Blanket Co., and the railroad sued the Blanket Co. as a third party defendant, and stated that the latter had agreed to indemnify the railroad against its own negligence. The Court held that since the indemnity agreement, though mentioning other kinds of structures, did not specifically mention a draw bridge, it would not be construed as an indemnity agreement. In so holding the Court said:

> "Where, in a contract of indemnity, general words are used after specific terms, the general words will be limited in their meaning to things of like

kind and nature, as those specified. Thus, a clause in the contract to save harmless from loss, damage or injury, by 'fire or otherwise' including the negligent operation of lessor's locomotive, and the clause 'holding the lessor harmless from all injury,' etc., that may result from the operation of the 'unloading machine and appurtenances or other buildings, structures or fixtures' was held not to include damages resulting from a drawbridge built by the defendant Blanket company, inasmuch as the unloading machine is nothing like a drawbridge."

Also see:

Martin et al. v. American Optical Co., 184 Fed. 2, 528 (5th Cir. 1950);

Foster v. Pennsylvania Railroad Co., 104 Fed. Sup. 491 (E.D. Pa. 1952);

Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Co., a corporation, 70 N.E. 2d 604 (Ill. 1946);

Glens Falls Indemnity Co. of Glens Falls, N.Y. v. Reimers, 155 P. 2d 923, 925;

Sinclair Prairie Oil Co. v. Thornley, 127 Fed. 2d 128 (10th Cir. 1942);

Southern Railway Co. v. Coca Cola Bottling Co., 145 Fed. 2d 304, 307 (4th Cir. 1944).

An important difference exists between the circumstances of this case together with the lease provision found in the agreement between the Union Pacific Railroad and the Lumber Company, and the circumstances existing in *Booth-Kelly Lumber Company v.*

Southern Pacific Railroad Company, 183 Fed. 2d 902, 20 A.L.R. 2d 695.

The lease provision in the *Booth-Kelly* case[14] from which the Court of Appeals for the Ninth Circuit held to be an indemnity agreement, provided as follows:

> "Industry also agrees to indemnify and hold harmless railroad for loss, damage, injury or death, from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto, and their employees, and to the person or property of any other person or corporation while on or about said track; * * *".

Section 5 of our lease agreement provides as follows:

> "Section 5. It is especially covenanted and agreed that the use of the leased premises or any part thereof for any unlawful or immoral purposes whatsoever is expressly prohibited; that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

In the *Booth-Kelly* case, the defendant also had violated a specific provision of the spur-track agree-

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[14]See Appendix for a further discussion of *Booth-Kelly Lumber Co. v. Southern Pacific Railroad Co.,* supra.

ment by putting a cart less than 6 feet away from the railroad track.

In the case in front of this Court we are not concerned with an agreement in which the railroad has gone onto the property of the Hallack and Howard Lumber Company and consented to put in a spur track. In those cases it is more natural that the Railroad Company would expect that while operating on the lessor's premises it would be held free and clear of any responsibility whatsoever. Here the Railroad leased its *own* property for a valuable consideration. Here the actual accident occurred on the Railroad property, and apparently not even on the leased property. Furthermore, the Booth-Kelly Lumber Company was negligent and was so adjudged by the trial Court. It expressly violated a provision in the contract regarding the placing of carts by putting one 42 inches from a track, thereby causing an employee of the Railroad to be crushed between the cart and a moving caboose car. The trial Court further found that the Booth-Kelly Lumber Company's negligence was the primary cause for the injury to the Railroad's employee. Here, the Lumber Company was not adjudged negligent, and had nothing whatsoever to do with the injury to Powell. The Railroads then, are seeking to indemnify themselves for their own negligence. On page 254 of the record, the trial Court said itself that it was an "injustice" to enter a judgment against The Hallack and Howard Lumber Company in the sum of $18,334.15.

Another distinction is that the hold harmless agreement in the *Booth-Kelly* case specifically provided that the Industry would indemnify the railroad for any damage or loss occurring to the railroad's "employees". No such language appears in Section 5 of the lease agreement. The language there is general. There is no unequivocable statement that Hallack and Howard is to be liable for the Railroad's own negligence in harming its own employee.

In the *Booth-Kelly* case the Court specifically points out that the rule of an Oregon case, *Southern Pacific Company v. Layman,* 173 Ore. 275, 145 P. 2d 295, had no application because the Southern Pacific was suing the Booth-Kelly Lumber Company and seeking indemnity from it, not "for its own negligence, but rather for that of Booth-Kelly". The Court implies that under different circumstances, such as existed in the *Layman* case, and as does exist here, even that contract provision would be construed differently. This might be the case even though the Booth-Kelly Lumber Company put a cart less than 6 feet from the railroad track.

Further in the *Booth-Kelly* case there is no statement that the Southern Pacific Railroad knew the car was there or acquiesced in the dangerous condition. In this case all of the evidence in the record shows the Railroad knew at all times of the method and manner of the unloading of logs on the leased premises.

It is these material distinctions between the two cases which require a different result. The only similarity between the facts of the two cases is that a

railroad and a lumber company are parties. If the broad language in Section 5 is to be construed as requiring the Lumber Company to respond for another's negligence, then any language of a general nature could bring about the same results. Bedal believes that this case, unlike the *Booth-Kelly* case, comes squarely within the principles laid down in *Southern Pacific Railroad Company v. Layman,* supra.

In the *Layman* case, Southern Pacific Railroad Company entered into an agreement with Layman whereby the latter was allowed to construct and maintain, and use a private road crossing upon the Railroad's right of way in Oregon. Layman was given a right to use the right of way. One part of the agreement provided that "Licensee shall and hereby expressly agrees to indemnify and hold harmless the Licensor and its lessor, from and against any and all loss, damage, injury, cost and expense of every kind and nature, from any cause whatsoever, resulting directly, or indirectly, from the maintenance, presence or use of said crossing."

The Court can observe how similar that language is to the language in section 5 of the lease agreement with The Hallack and Howard Lumber Co. (R. 10.)

On August 15, 1939, a machine was struck and demolished by the Southern Pacific train. The owner of the machine successfully sued the Southern Pacific Railroad, and recovered because of the latter's negligence. Layman was not negligent nor was he adjudged in any stage of the proceedings to be so. The Oregon Supreme Court pointed out that the agreement should

be strictly construed, particularly where the licensee was not negligent. The Oregon Court held that the provisions did not indemnify the Railroad against its own negligence. In doing so, the Court followed the principle set forth in *Perry v. Payne,* 217 P. 252, 262, 557, 11 L.R.A. N.S. 1173, 10 Ann. Cas. 589, in which the Court said:

> "We think it clear on reading an authority that a contract of indemnity against personal injuries, should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocable terms. The liability on such indemnity is so hazardous, the character of the indemnity so unusual, and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility, unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it."

The editors of American Jurisprudence indicate that some Courts hold such provisions indemnifying a party against his own negligence are void as being against public policy.

27 *Am. Jur.* 460, Sec. 9.

Also see

17 *C.J.S.* Contracts, page 644, Sec. 262.

Although it is doubtful that this is the prevailing view, it does show that such agreements are not favored.

In considering not only section 5 itself, but also the circumstances in which it was applied, we feel that the trial Court erred as a matter of law in enter-

ing judgment in favor of the Railroad and against the Lumber Company.

Appellants also appealed from the Findings of Fact and Conclusions of Law entered in support of the judgment in favor of the Railroads. The specific portions complained of are set out in the Specifications of Error. Appellant has discussed these Findings in the first argument wherein it was shown that the trial Court erred in not amending the Findings of Fact and Conclusions of Law according to Bedal's Motion. (R. 113.) The question of whether Bedal was negligent or not was not tendered by the Railroads in their complaint (R. 3); it was not the basis for the judgment of the Court (R. 248, 255, 234); and there was no such evidence presented.

CONCLUSION.

In Conclusion, Appellants contend that not only was the judgment against the Lumber Company not supported by the law under the circumstances and facts presented, but, of course, the Lumber Company's judgment against Bedal was error for the many reasons cited in Bedal's first argument.

Dated, Boise, Idaho,
April 9, 1954.

ELAM & BURKE,
FRED M. TAYLOR,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

THE CASE OF BOOTH-KELLY LUMBER CO. v. THE SOUTHERN PACIFIC COMPANY SUPPORTS THE POSITION OF BEDAL AND NOT THE POSITION OF THE LUMBER COMPANY.

The Court of Appeals for the 9th Circuit on June 28, 1950, wrote a decision which discusses many of the rules of law applicable to cases of the kind now in front of this Court. *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 Fed. 2d, 902, 20 ALR 2d, 695 (9th Circuit).

In this case the Southern Pacific Company sought indemnity from the Booth-Kelly Lumber Company, an Oregon corporation. Earlier Southern Pacific settled a judgment against it by one of its employees, a man named Powers, who sued the Railroad Company on account of certain injuries he received. His suit was brought under the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq. The employee, Powers, was injured on Booth-Kelly premises over which the railroad had constructed an industrial track pursuant to a spur-track agreement. Booth-Kelly's servant had left a wood cart so near the track that the nearest corner of the cart was only 42 inches from the nearest rail. Powers was caught between the caboose and the cart, when he undertook to climb out a door on the moving train. Booth-Kelly had violated a covenant in its spur-track agreement in which it agreed to keep material on its premises at least 6 feet from the nearest rail.

Southern Pacific notified Booth-Kelly of Powers' action against it, and tendered the defense to Booth-Kelly, and demanded that such defense be undertaken. The tender was declined. Southern Pacific in a separate action against Booth-Kelly seeks to recover indemnity for the amount it has actually paid Powers.

Besides the minimum clearance provision previously mentioned, Booth-Kelly in the spur-track contract agreed to indemnify "and hold harmless railroad for loss, damage, injury or death from any acts or omission of Industry, its employees, or agents, to the person or property of the parties hereto, and their employees, and to the person or property of any other person or corporation while on or about said track; * * *". The railroad sought recovery on two main grounds:

A. That Booth-Kelly specifically contracted to indemnify the railroad, and

B. That Booth-Kelly was primarily negligent while the railroad was passively negligent and therefore the latter should recover against the prime wrongdoer.

The case was tried in front of the trial Court in Oregon and the trial court found in favor of the Southern Pacific Railroad Company. The trial Court found that the Lumber Company violated its provision in the agreement with regard to keeping material at least 6 feet from the nearest track, and that this negligence was the principal and primary cause of Powers' injury. The lower Court also found that

both were concurrently negligent, and that another provision of the contract was applicable. We do not need to discuss that phase of the case here, although the Court of Appeals for the 9th Circuit reversed the trial Court on this particular point.

The Court of Appeals for the 9th Circuit relied heavily on the case of *Washington Gas Light Co. v. District of Columbia, supra.* The Court also examined Restatement of the Law of Restitution, Section 102, and Restatement of the Law of Restitution, Sec. 95.[1] This latter section provides in part that a person who acquiesces in a dangerous condition after discovery of the same is a joint tort-feasor. The Court observed that the lumber company alone was the party which made the chattel on its own land dangerous to others, and thus specifically came within the framework of Restatement of Restitution, Sec. 95. There was no evidence that the railroad acquiesced in this condition. Further the trial Court observed in making its decision that in the *Powers* case the railroad was specifically charged with causing the wood cart itself to remain on the track and failing to warn the workmen of its presence. The lower Court's finding in the action by the railroad that the lumber company's

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[1] "Person Responsible for a Dangerous Condition.

"Where a person has become liable with another for harm caused to a third person because his negligent failure to make safe a dangerous condition of lands or chattels, which was created by the misconduct of the other, or which, as between the two it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability unless after discovery of the danger, he acquiesced in the continuation of the condition." (Restatement, Restitution, Sec. 95.)

negligence was active and primary negatived "the existence of the acquiescence" mentioned in the comment to Section 95, Restatement of Restitution.[2] The Court also pointed out that the question in the action by the railroad against Booth-Kelly Lumber Company was not the same as the issues in front of the court when Powers sued the railroad originally. For example, the Court said:

> "But which acts of negligence was primary, or which active or direct, was not an issue in the Powers case."

It was Booth-Kelly in this case which asserted that the former action bound the railroad and that the former case determined that the railroad was solely negligent. This Court of Appeals rejected Booth-Kelly's argument, and said that the former case was simply determinative of the fact that Powers was injured, the extent of the judgment, and that a contributing proximate cause of these injuries was the negligent failure of Southern Pacific to furnish him a safe place to work, by failing to warn him of the presence of the wood cart. Thus the issue of negligence of the Booth-Kelly Lumber Company, and the

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[2]In Comment, Restatement of Restitution, 95:

"In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable. On the other hand, if the condition was such as to create a grave risk or serious harm to third persons, or their property, and the payor was, or from his knowledge of the facts, should have been aware that such a risk existed, his failure to make the condition safe is reckless, and he is not entitled to restitution."

issue of whether this negligence was primary or secondary was *again* litigated by the trial Court. In the case *now* before this Court, of course, the Idaho trial court refused to allow these questions to go to the jury, and refused to allow any findings along these lines to be made, and said that the first action had definitely determined that Bedal was the one primarily negligent, and that Bedal was bound by that finding.

There are numerous distinctions that must be made. If the court follows the principles laid down in the *Booth-Kelly* case it becomes clear that the action of the trial court in directing a verdict in favor of the Lumber Company must be reversed. Let us examine these differences one by one.

1. It was the Southern Pacific Railroad Company, a party to the action against Powers, that gave notice to the lumber company to defend that action, and requested and demanded that they take part in the defense. In this case, the Union Pacific Railroad Company was the party to the action brought by Powell. The Union Pacific Railroad Company never gave any notice to Bedal to defend the case. Neither did the Lumber Company ask or request that Bedal defend the case. The Lumber Company only stated in a letter to Bedal that if Powell did recover against the Railroad, and if the Railroad sought and recovered against the Lumber Company, that eventually the Lumber Company would hold Bedal responsible for any such damage. This was not and cannot be

a tender of defense. As a consequence Bedal would not be responsible for any finding or conclusion reached in the case of Powell v. Union Pacific Railroad because that decision was not *res judicata* as far as Bedal is concerned.

2. The Booth-Kelly Lumber Company was also adjudged responsible and liable to the railroad by reason of its indemnity agreement. Bedal will discuss this holding and finding in his argument arising from Bedal's appeal from the decision in favor of the Union Pacific Railroad Company, and against the Hallack and Howard Lumber Company. Suffice it to say at this point that the agreement in question was a spur-track agreement, covering what might occur on Booth-Kelly's property. The contract between The Hallack and Howard Lumber Company, and the Union Pacific Railroad Company was not a spur-track agreement. It was an agreement whereby the Railroad leased its ground to the Lumber Company.

3. The issue of primary negligence and the issue of Booth-Kelly's negligence, were all issues that the court stated were *not* determined in the case of *Powers v. The Southern Pacific Railroad Company.* The trial court considered these points for the first time and made findings in favor of the railroad company, but after a trial. In this case the Idaho trial court refused to allow these issues to be submitted to a jury, but held they were all determined in the first action brought by Powell against the Railroad.

4. There was no finding made in the Booth-Kelly case that the railroad knew of the dangerous condition presented by the cart being on the track. In the case at hand, all of the eviednce indicates the Union Pacific had full knowledge for months preceding the injury to Powell of the method that logs were unloaded. This knowledge brings the case squarely with Restatement of Restitution, Sec. 95. As a matter of law the Union Pacific Railroad Company acquiesced in any dangerous condition that might have existed.

5. The evidence in the case in front of this Court shows that as a matter of law Bedal was not negligent, and as a matter of law the trial court should have found in favor of Bedal and it was error not to do so. Bedal's motion for a directed verdict should have been granted.

The trial court not only failed to follow the principles laid down in the *Booth-Kelly* case, but followed rules of law that simply do not exist. Bedal was held responsible for damages paid by the Lumber Company by reason of its contract with the Railroad Company, without even a chance to have the facts surrounding all the circumstances passed upon by a jury. Bedal is not even allowed to benefit from an instruction that Powell's contributory negligence would be a bar to his recovery since such a defense was not available to the Railroad. 45 *U.S.C.A.* 379, Sec. 53. Exhibit 7, p. 188.

Bedal has used the *Booth-Kelly* case in the Appendix because it points up many of the issues to be found in the case before this court and should be carefully and fully analyzed. Appellant believes a comparison of the two cases with the different factual situations shows conclusively and without doubt that the trial court erred in directing a verdict in favor of the Lumber Company. We firmly feel that there is no evidence whatsoever in the record, of either the case as tried by the Idaho District Court, or the Powell case tried two and a half years earlier, which shows negligence on the part of Bedal whatsoever. Furthermore, that record does show that Railroad was estopped from claiming contribution or indemnity from Bedal because it was a joint tort-feasor, acquiescing in a dangerous condition. This being the case it was error for the trial Court to fail to grant a directed verdict in favor of Bedal since the Lumber Company stands in the same shoes as the Railroad, and, at the very least, error for failing to submit these questions to a jury.

No. 14,197

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vs.

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and

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Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION.

Appeals from the United States District Court for the District of Idaho

BRYAN P. LEVERICH,
10 South Main Street,
Salt Lake City, Utah.
L. H. ANDERSON,
E. H. CASTERLIN,
E. C. PHOENIX,
P. O. Box 530,
Pocatello, Idaho
Attorneys for Appellees,
Oregon Short Line Railroad Company
and
Union Pacific Railroad Company.

GATEWAY PRINTERS – POCATELLO

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10 South Main Street,
Salt Lake City, Utah.
L. H. ANDERSON,
E. H. CASTERLIN,
E. C. PHOENIX,
P. O. Box 530,
Pocatello, Idaho
Attorneys for Appellees,
Oregon Short Line Railroad Company
and
Union Pacific Railroad Company.

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W. O. BEDAL,

Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,

Appellee;

and

W. O. BEDAL,

Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEES OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION.

STATEMENT OF CASE

On October 3, 1950, one A. M. Powell instituted an action against the Union Pacific Railroad Company for personal injuries sustained by Powell at Banks, Idaho, on the 15th day of September, 1949, while employed as a car inspector and who recovered a judgment against the Union Pacific Railroad Company under the Federal Employers Liability Act in the sum of $15,000.00, (R 3-7, 128-131, 135, Ex. 2). The motion of the Union Pacific Railroad Company for Judgment Notwithstanding the Verdict (R 136-140, Ex. 2) was by the court overruled (R 141-142, Ex. 2).

An appeal was perfected (R 142-150 Ex. 2), but before the record was filed in this court the Union Pacific Railroad Company on December 15, 1951, compromised said judgment with Powell for the sum of $14,500.00 (R 150-151, Ex. 2) and the appeal was dismissed (R 152, Ex. 2).

Following this, and on October 3, 1952, the appellees, Oregon Short Line Railroad Company and Union Pacific Railroad Company instituted this action against The Hallack and Howard Lumber Company to recover the amount the Union Pacific Railroad Company had paid to satisfy the judgment in the Powell case, plus interest, costs and attorney fees (R 3-15). This action was and is based primarily upon a lease, Exhibit "A" attached to the complaint (R 8-14 and Ex.1) (the same as Ex. A attached to the complaint), R 126, and secondarily, upon implied indemnity, "or independent of said lease." Paragraph IX of the Complaint (R 7).

Upon the filing and service of said complaint the appellee, The Hallack and Howard Lumber Company, brought in as a third party defendant W. O. Bedal, the appellant herein (R 17-18).

September 21, 1953, the case of the Railroads vs The Hallack and Howard Lumber Company, and the third party action of The Hallack and Howard Lumber Company against W. O. Bedal, came on for trial, each being handled as separate cases, with the Court trying the case of the Railroads against The Hallack and Howard Lumber Company, and the third-party action of The Hallack and Howard Lumber Company against W. O. Bedal by the court and a jury (R 125).

Upon the conclusion of the Railroads' evidence they and the Lumber Company rested (R 234) and the court then found that the Union Pacific Railroad Company was entitled to recover from The Hallack and Howard Lumber Company under the indemnifying contract "and on account of the negligence found to have existed on the premises" (R 234-235). Findings of Fact and Conclusions of Law were then signed and filed (R 92-99) and judgment entered in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company in the total sum of $18,334.15 (R 103-104).

The third party action of the Lumber Company against W. O. Bedal was then tried to the court and jury and upon conclusion of the Lumber Campany's evidence it and the third party rested (R 244), following which The Hallack and Howard Lumber Company's Motion for Directed Verdict in its favor (R 245-247) was by the court granted (R248-255). Verdict in favor of The Hallack and Howard Lumber Company against W. O. Bedal was returned (R 105-106) and judgment entered thereon (R 107-108).

From the judgment in favor of the Union Pacific Railroad Company against The Hallack and Howard Company (R 117-118), and from the judgment in favor of The Hallack and Howard Lumber Company against W. O. Bedal, Bedal has appealed (R 114-115).

No appeal has been taken by The Hallack and Howard Lumber Company from the judgment in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company. That judgment is now final.

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship of the parties and that the amount involved, exclusive of interest and costs, exceeded $3,000.00. The appellees Oregon Short Line Railroad Company and Union Pacific Railroad Company are both citizens and residents of the State of Utah, and the appellee The Hallack and Howard Lumber Company is a resident and citizen of the State of Colorado (R 3, 68, 72). Accordingly the District Court had jurisdiction 28 U.S.C.A. 1332, and this Court ordinarily has jurisdiction to review such matters as those on appeal, 28 U.S.C.A. 1291, Rule 73, Federal Rules of Civil Procedure, but is without jurisdiction to reveiw the judgment of the Union Pacific Railroad Company vs. The Hallack and Howard Lumber Company. The Lumber Company not having appealed that judgment is final.

QUESTIONS INVOLVED AND MANNER IN WHICH THEY ARE RAISED

So far as the judgment in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company (R 103-104) is concerned, the appellant says on page 87 of his Brief:

> "The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial court erred in construing Section 5 of the lease agreement (R 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad."

Appellees, the Railroads, contend that as between them and the Lumber Company this question is moot. The Lumber Company has not appealed from the judgment and the judgment is as between these parties, valid and binding.

THE FACTS

This litigation arises out of the case of Albert M. Powell vs. Union Pacific Railroad Company. Powell, a car inspector of the Union Pacific Railroad Company was employed to make repaiirs to log cars at Banks, Idaho, and on September 15, 1949 (R 176-177) while logs were being unloaded from a truck on a road to the west of the tracks about 70 feet (R 179-212) a slab about four feet long weighing 60-70 pounds (R 201, 217) broke off from one of the logs and flew through the air striking and injuring him (R 185). This slab broke off from a log when the logs were about half way down the hill (R 217, 221, 225, 230, 232) and before the logs reached the landing (R 218). This landing was formed by a row of bunker logs to the west of the tracks to keep the logs from rolling across the tracks when they were unloaded (R 178) and was level to the west or to the foot of the hill for a distance of about 20 feet (R 190, 204, 214, 230). The road where the truck was located and when the logs were dumped was about 20 feet higher than the level of the tracks (R 188, 189, 212, 230).

The logs were pushed from the truck by a caterpillar and would strike the ground with considerable force (R 208), fall down the steep incline unrestrained, and the slab whcih

injured Powell was caused to break off because of the force of the drop (R 141). The logs after being unloaded would roll down the hill, onto the landing and against the bunker logs (R 178, 195, 209).

When the logs were ready to be dumped Powell stepped off the top of the log car onto the bunker log (R 181-182) and was seated on the bunker log, 60-70 feet north of where the logs were being dumped down the hill to the east (R 183, 215), when the accident occurred. Powell never saw the slab in flight until it was three or four feet from him (R 185, 190-191).

The placing of the bunker logs was done by Bedal (R 189, 207, 214), the cleaning of the bunker was done by Bedal (R 190, 207), the logs were hauled into Banks, unloaded and loaded by Bedal (R 171, 188, 191, 211, 239). The railroad had nothing to do with that (R 171, 188). The logs were owned by The Hallack and Howard Lumber Company (R 171, 156), who paid Bedal for hauling, unloading and loading of said logs on cars for shipment instead of The Hallack and Howard Lumber Company performing the work itself, all of which was done for the use and benefit of the Hallack and Howard Lumber Company (R 156). All of the unloading and loading of the logs, at the time Powell was injured, was being performed on the premises leased to The Hallack and Howard Lumber Company by the Railroads, appellees, herein, (Ex. 5, R 170, 238), and so admitted by The Hallack and Howard Lumber Company's failure to answer the Railroad's request for ad-

mission (Ex. 3, R 154, 155, 156). As to this there was and is no controversy (R 241).

Exhibit A attached to the Railroad Companys' complaint, and Exhibit 1 (the same as Exhibit A), contains the following indemnifying clause:

> "Section 5. * * * that the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

These facts, together with the admissions made by The Hallack and Howard Lumber Company in its answer to the Railroad's complaint, fully and completely sustain the findings of fact and conclusions of law (R 92-99) and accordingly fully support the judgment entered therein in favor of the Union Pacific Railroad Company and against The Hallack and Howard Lumber Company (R 103-104), and from which The Hallack and Howard Lumber Company has not appealed.

ARGUMENT

THE JUDGMENT IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE HALLACK AND HOWARD LUMBER COMPANY CANNOT BY THIS APPEAL BE DISTURBED SO FAR AS THE RAILROADS AND THE LUMBER COMPANY ARE CONCERNED.

The Lumber Company has not appealed from the judgment entered in favor of the Union Pacific Railroad Company and against the Lumber Company. That judgment certainly as between the parties thereto is final and cannot be affected by any appeal taken by the appellant W. O. Bedal.

It should be remembered that the Railroads, appellees herein, instituted their action against the Lumber Company and not against Bedal; he was brought in by the Lumber Company but the Railroads did not make themselves parties to the third party proceedings.

The case of the Railroads against the Lumber Company was tried by the court and findings and judgment made by the court in that case, and then the case of the Lumber Company vs. Bedal was tried by the court and a jury. (R 125). Separate judgments were entered. (R 103, 104, 107-108). The Railroad was not a party to the judgment against Bedal, and Bedal was not a party to the Railroads judgment against the Lumber Company. The Railroads never looked to Bedal for a recovery; they looked directly to the Lumber Company because of the lease it had and because it was responsible for what was being done at Banks under the lease.

The Lumber Company does not and cannot now say the judgment of the Union Pacific Railroad Company is not valid and binding.

> "Without an appeal a party will not be heard in an appellate court to question the correctness of the decree of the trial court."
>
> *Cherokee Nation vs. Blackfeather*
> 155 U.S. 218, 221, 39 L. Ed. 126, 127;
>
> *Bothwell vs. United States,*
> 254 U. S. 231, 65 L. Ed. 238.

Even if the judgment was wrong that does not make it void. No timely appeal having been taken by the Lumber Company the judgment remains effective and is a conclusive adjudication

> *Rooker vs. Fidelity Trust Co.,*
> 263 U. S. 413, 415, 68 L. Ed. 362, 365.

The judgment is conclusive upon the parties to it, and it cannot be collaterally attacked.

> *Schodde vs. United States,*
> (9 Cir.) 69 Fed. (2d) 866, 870.

> "It is well settled that in the absence of a cross-appeal an appellee cannot attack the decree with a view either to enlarging his own rights thereunder or lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."
>
> *Smith vs. Boise City, Ida.*
> (9 Cir.) 104 F. (2d) 933.

"Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken."

Morley Construction Co., vs. Maryland C. Co.,
300 U. S. 185, 81 L. Ed. 593, 598.

"* * * the rule is settled in the Appellate Court, that a party not appealing cannot take advantage of an error in the decree committed against himself, and also, that the party appealing cannot allege error in the decree against the party not appealing."

Chittenden vs. Brewster,
69 U. S. 191, 17 L. Ed. 839, 841.

"It is well settled that an appeal errors affecting a party who does not appeal will not be reviewed, * * *"

Salter vs. Ulrich
(Cal.) 138 Pac. (2d) 7, 146 A. L. R. 1344, 1348.

See also—

Phillips vs. Phillips
(Cal.) 264 Pac. (2d) 926, 930.

Denman vs. Smith
(Cal.) 97 Pac. (2d) 451, 452.

The Lumber Company cannot question the judgment against it. Neither can it question the findings or conclusions of the court.

California Canning Peach Growers vs. Williams,
(Cal.) 78 Pac. (2d) 1161, 1164.

The judgment in favor of the Union Pacific Railroad Company and against the Lumber Company is satisfactory to both parties thereto. That is the affect of the judgment because the Lumber Company has not appealed and the judgment has become final as between the parties. Inasmuch as Bedal is not named therein and is not a party thereto his attempted appeal cannot affect that judgment and it must and should be affirmed as between the Union Pacific Railroad Company and the Lumber Company irrespective of whether Bedal can attack it so far as the judgment of the Lumber Company against him is concerned.

THIS COURT HAS NO JURISDICTION TO HEAR THE APPEAL OF BEDAL FROM THE JUDGMENT ENTERED IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE HALLACK AND HOWARD LUMBER COMPANY AND THAT APPEAL SHOULD BE DISMISSED.

Bedal was never a party to the case of the Railroads against the Lumber Company. The Railroads never made him a party and did not make themselves a party to or in any way become involved in the third party action against Bedal. The case was tried independent of the action of the Lumber Company against Bedal and the judgment went against the Lumber Company and not against Bedal. The fact that Bedal was brought in as a third party defendant by the Lumber Company does not make Bedal a party to the action of the Railroads against the Lumber Company. The third party action is only procedural, aand is for the purpose of avoiding

circuity of action and to dispose of the entire subject matter arising from one set of facts. It does not change the substantive law.

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 838 Sec. 422.

Whether a third party should be brought in is discretionary with the court.

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 839, Section 423.

> "To summarize the foregoing change, it may be said that under Rule 14 as originally framed the defendant might have brought in as a third party defendant either a person who was secondarily liable to him or a person who was primarily liable to the plaintiff. *Under the 1948 Amendment only a person who is secondarily liable to the original defendant may be brought in.*" (emphasis ours)

> *1 Federal Practice and Procedure*
> (Barron and Holtzoff) 834-837, Sec. 421.

As stated, the Railroads did not in any way become involved in the third party proceedings, and did not amend their complaint to state a claim against Bedal, there was no issue between the Railroads and Bedal, and the Lumber Company could not compel the Railroads to accept Bedal as an additional defendant.

> See Text of Advisory Committee's Note to Amendment of Rule 14 A, commencing on page 835 of the above Text.

While it is true that Bedal as a third party defendant could assert any defenses which the Lumber Company might have to the plaintiff's claim, that was only to protect him as against the Lumber Company, (see Text of the Advisory Committee Note, page 837), and certainly does not authorize him to collaterally attack or wipe out a judgment obtained by the Union Pacific Railroad Company against the Lumber Company to which he was not a party. The Lumber Company is satisfied with the judgment against it and, of course, cannot now urge error of any kind.

Appellant Bedal was not a party to the action of the Railroads against the Lumber Company, and only a party can appeal.

Rule 73 (a) Federal Rules of Civil Procedure.

The appeal is not taken by a party, therefore this Court of Appeals has no jurisdiction, and the appeal must be dismissed.

Penwell vs. Newland
(9 Cir.) 180 Fed. (2d) 551.

Where a defendant was not named in a judgment he was not a party, and an appeal which included such defendant was dismissed.

Armstrong vs. New LaPaz Gold Mining Co.
(9 Cir.) 107 Fed. (2d) 453.

The judgment against the Lumber Company can only be enforced by the Union Pacific Railroad Company, and it can only enforce it against the Lumber Company. The judgment

is not adverse to appellant Bedal, and is not directed against him.

Milgram vs. Loew's Inc.,
(3 Cir.) 192 F. (2d) 579, 586.

"One who is not a party to a record and judgment is not entitled to appeal therefrom. * * *
"The merely general nature and character of the interest which the movers allege they have in the papers here filed is not, in any event, of such a character as to authorize them in this proceeding to assail the action of the court below. *This is more obvious in this case since the act of the court which is assailed has been accepted by those who are parties to the record."* (emphasis ours)

Matter of Leaf Tobacco Board of Trade.
222 U. S. 578, 56 L. Ed. 323.

Likewise in the case at Bar—the judgment has been accepted by the only parties to it, the Union Pacific Railroad Company and The Lumber Company.

The case at bar cannot be distinguished from the case of *Payne vs. Niles,* 61 U.S. (20 How. 219-221) 15 L. Ed. 895, wherein the court said:—

"Payne & Harrison, therefore, have no right to sue out a writ of error upon the judgment in the suit between Niles & Co., and Knox, to which they were not a party, nor can they make Knox or his representative a defendant in a writ of error brought upon the judgment on the petition of intervention to which Knox nor Broadwell, his syndic, was a party.
"This writ of error attempts to do both, and is therefore not warranted by law."

The 7th Circuit Court of Appeals *In Re Phoenix Dress Co.* 131 F. (2d) 726 did not require the citation of authorities to hold that an appeal could only be taken by a party to the suit or by someone duly authorized for that purpose.

The judgment against the Lumber Company has adjudicated the rights of the Union Pacific Railroad Company and the Lumber Company. The Lumber Company is satisfied with the judgment against it, or it would have appealed. It cannot now claim otherwise. The judgment is final, and whatever right appellant might have to attack the judgment so far as the third party case of the Lumber Company against him is concerned, he cannot by this appeal destroy a valid and subsisting judgment the Railroad has obtained against the Lumber Company.

IN ANY EVENT THE JUDGMENT IN FAVOR OF THE UNION PACIFIC RAILROAD COMPANY AND AGAINST THE LUMBER COMPANY IS SUPPORTED BY THE FACTS AND THE LAW AND MUST BE AFFIRMED.

The record and judgment in the Powell case is conclusive and binding upon the Lumber Company in this action.

Booth-Kelly Lumber Company vs. Southern Pacific
(9 Cir.) 183 Fed. (2d) 902; 20 A.L.R. (2d) 695;

Washington Gas Light Co., vs. Dist. of Columbia
161 U. S. 316, 40 L. Ed. 712;

Standard Oil Company vs. Robbins Dry Dock and Repair Company,
(2d Cir.) 25 Fed. (2d) 339; 32 Fed. (2d) 182.

Probably the only fact not established in the Powell case to fasten liability upon the Lumber Company under the lease was that the injuries to Powell occurred "by reason of the use or occupation of said premises by the lessee * * * or from any cause whatsoever growing out of said lessee's use thereof" (Sec. 5 of the lease). This evidence was supplied in this case against the Lumber Company. All of the unloading and loading of the logs at the time Powell was injured was being done on the premises leased to The Hallack and Howard Lumber Company by the Railroads, appellees herein, (Ex. 5 R 170, 238) and so admitted by the Lumber Company's failure to answer the Railroad Company's request for admission (Ex. 3, R 154, 155, 156). As to this there was and is no controversy (R 241).

The Lumber Company was in possession of the premises by virtue of the lease but had employed W. O. Bedal to haul, unload and load the logs (R 171, 188, 191, 211, 239). The railroad had nothing to do with that (R 171, 188). The logs were owned by the Lumber Company, who paid Bedal for the hauling, unloading and loading of the logs on cars for shipment instead of the Lumber Company performing the work itself under the lease, all of which was done by Bedal for the use and benefit of the Lumber Company (R 156).

The slab which struck Powell came from a log after it

was being dumped down a steep incline and unrestrained (R 141, 208). None of these facts are disputed, nor can they be by the Lumber Company. As a matter of fact, they are not disputed by Bedal. He offered no testimony whatsoever.

The proposition is so clear as to admit of no controversy that the Union Pacific Railroad Company was required to pay damages for injuries sustained by Powell through the acts and conduct of the Lumber Company in the use and occupation of the leased premises and by the acts and conduct of its agent W. O. Bedal. Hence the court ruled that the Union Pacific Railroad Company was entitled to recover from the Lumber Company under the indemnifying contract "and on account of the negligence found to have existed on the premises" (R 234-235). Accordingly the Findings of Fact and the portion of Finding XI (R 97) objected to by Bedal (but not by the Lumber Company) are fully supported by the facts. Incidentally the Court never ruled upon Bedal's objection to this finding, and of necessity it must stand in any event as between the Railroads and the Lumber Company.

That the conclusions of the court (R 98-99) and the judgment entered in favor of the Union Pacific Railroad Company and against the Lumber Company (R 103-104) are fully sustained by the law will now be discussed.

SECTION 5 OF THE LEASE, IS CLEAR AND UNAMBIGUOUS AND FULLY PROTECTS THE RAILROADS FOR ANY DAMAGES OR LOSS ARISING OUT OF THE USE OR OCCUPATION OF THE PREMISES.

On page 87 of Bedal's Brief it is asserted,—

> "The sole question presented on this appeal from the judgment in favor of the Railroads is whether the trial Court erred in construing Section 5 of the lease agreement (R. 10) in such a way as to hold The Hallack and Howard Lumber Company responsible for the sole negligence of the Railroad."

There is nothing in this record that the court so held. The court held to the contrary. The court allowed recovery under the lease "and account of the negligence found to have existed on the premises" (R 234-235).

Clearly this was not the negligence of the Railroad for it had nothing to do with hauling, unloading or loading of the logs. This was done by the Lumber Company by and through its Agent Bedal.

The provision of the lease is broad enough to indemnify the Railroad for its own negligence, if any, as we will presently show, but what the lease provision does is to indemnify the Railroad Company against the acts or conduct of the Lumber Company irrespective of how such acts or conduct are characterized. *Booth-Kelly Lumber Company vs. Southern Pacific,* supra, page 912, wherein the court stated that the "Southern Pacific seeks indemnity not for its own negligence, but rather for that of Booth-Kelly."

Section 5 of the lease required the Lumber Company to indemnify the Railroads irrespective of how the injuries occurred so long as they arose out "of the use or occupation of said premises * * * or from any cause whatsoever growing

out of said lessee's use thereof." This provision is broad enough to require the Lumber Company to indemnify the Railroads even if they were negligent.

Booth-Kelly Lumber Company vs Southern Pacific Company, Supra;

Ringling Brothers-Barnum and Bailey C. Shows vs. Olvera
(9 Cir.) 119 Fed. (2d) 584;

Sante Fe RR Co., vs. Grant Brothers Construction Company
228 U.S. 177, 57 L. Ed. 787;

Rice vs. Pennslyvania R. Co.,
(2d Cir.) 202 Fed. (2) 861;

Mpls.-Moline Co., vs. Chic. M. St. P. P. & R. Co.
(8 Cir.) 199 Fed. (2d) 725;

Aluminum Company of America vs. Hully
(8 Cir.) 200 Fed. (2d) 257;

Buckeye Cotton Oil Co., vs. Louisville & N.R. Co.
(6 Cir.) 24 Fed. (2d) 347;

Kokusai Kisen Kabushiki Kaisha vs. Columbia S. Co.
23 Fed. Supp. 403, affirmed 100 Fed. (2d) 1016;

National Transit Co., vs. Davis
(3 Cir.) 6 Fed. (2d) 729.

In *Ringling Brothers-Barnum & Bailey C. Shows vs. Olvera,* Supra, this court held that when a contract released

all claims, demands, causes of action, damages, etc., but did not mention "negligence" ordinary negligence nevertheless was included, citing Sante Fe RR Co., vs. Grant Bros., Construction Company, supra, in which case the court held that the Railroad and the Construction Company were on equal footing and they had the right to contract and while the word "negligence" was not mentioned expressly that it was necessarily intended by the use of such terms as "all risk of loss and damage," "at consignee's risk of loss and damage." "all risk of accident to person and baggage."

In *Rice vs. Pennsylvania R. Co.*, supra, one Luria, who had nothing to do with the loading of the scow, was held responsible to the United States under an agreement to hold the Government harmless from any and all claims of whatsoever nature for injuries to persons or property occurring during the removal of the material. The court said:—

> "It is impossible to conceive how any valid claim could arise against the Government for injuries 'occurring during the removal' unless its employees were negligent. Consequently we see no way to interpret the covenant otherwise than as an unequivocal expression of intent to indemnify the United States against the negligence of its own employees."

In *Minneapolis-Moline Co., vs. Chic. M. St. P.P. & R. Co,.* supra, no mention is made in the contract of any negligence. However, the court held that the terms were broad enough to exempt the Railroad Company from the result of its own negligence and that such a contract contravened no public policy. It refers to the case of John P. Gorman Coal

Co. vs. Louisville & N.R. Co., 213 Ky. 551, 281 S.W. 487, and quoting from that case the court said,—

> "Appellant might have made it a condition of liability that it should be guilty of some negligence, but this it did not do. It was free to make any contract it chose so long as it was not against public policy, and, having chosen to undertake an absolute liability rather than a qualified one, it cannot now be heard to complain of the choice it made."

This particularly covers liability of the Lumber Company in the case at Bar under Section 5 of the lease.

In *National Transit Co., vs. Davis,* supra, the contract was to indemnify and save harmless from and against all claims, suits, costs, losses and expenses in any manner resulting from or arising out of the laying, maintenance, renewal, repair, use or existence of said pipe, and no mention was made of negligence. This was held to be broad enough to include negligence of the Railroad. The Court stated,—

> "It would seem clear that if the indemnifying clause of the contract were limited to claims and suits where the Railroad was blameless there would in point of fact be nothing to which such indemnifying clause would apply."

In *Buckeye Cotton Oil Company vs. Louisville & N. R.* Co. supra, the indemnifying clause did not include the word negligence. The court held, however, that the agreement was clear in this respect, for it said— "to hold the first party harmless from the claims and demands of any and all persons

on account of any damages or injuries caused directly or indirectly by the existance, location, or condition of any structure or obstruction of any kind on the premises of the second party or by any obstruction on said tracks."

As mentioned by this court in *Booth-Kelly Company vs. Southern Pacific Company*, supra, page 910, Booth-Kelly's interests were served by the making of this contract, and that, of course, is true in the case at Bar. The Railroads were under no obligation to unload logs or load logs onto their cars; this was the obligation of The Hallack and Howard Lumber Company, and it wanted this particular site upon which to perform its work of unloading, scaling and loading the logs .It was a benefit to the Lumber Company to have possession of these premises, otherwise it would not have entered into a lease and paid the rental thereon, and likewise the Railroad Companies were not going to give up possession of its premises for such work as the Lumber Company intended to perform without having protection for some such an accident as occurred to Powell. The interest here on the part of the Lumber Company was similar to the interest which Booth-Kelly Company had in the spur track built by the Southern Pacific Company for it, for it was by these leases that both parties were benefited, and particularly the Lumber Companies.

In the Booth-Kelly Lumber Company case, in talking of the meaning of the paragraph relating to indemnity and the contemplation of the parties, the court said,—

> "And in view of the fact that in most cases where demand for indemnity arises, the claimed indemnitee

> must have been found liable by reason of some negligence, we think it extremely unlikely that all such cases were intended to be excluded from the operation of the first portion of the paragraph. Otherwise, this portion of the paragraph would have little or no application to any actual case."

That, of course, is true with reference to the provisions of Section 5 of the Lease in this case. It was intended certainly that the Railroad Company should have protection from any damages or suits that might arise by reason of the use and occupation of the premises by the Lumber Company. Two State cases are particularly applicable,—

> *Griffiths vs. Broderick*
> (Wash.) 182 Pac. (2d) 18, 175 A.L. R., 1;

Southern Pacific Company vs. Fellows, 71 Pac. (2d) 75, 77—A case which the Supreme Court of California declined to review; and under an indemnity clause in a contract, which we think cannot be distinguished from Section 5 of the lease in the case at Bar, it was held that the provisions were so sweeping and all embracing that although it did not contain an express stipulation indemnifying the appellant against liability caused by its own negligence it accomplished the same purpose.

To the same effect see—

> *New Orleans Great Northern R. Co. vs. S. T. Alcus & Co.,* (La.) 105 S. 91.

The Union Pacific had no duty to either unload these

logs or load them; that was an obligation of The Hallack and Howard Lumber Company, the owner and shipper of the logs. Therefore when the Railroads gave up a portion of their premises for the benefit of The Hallack and Howard Lumber Company whereby it could perform its function of unloading and loading the logs and the Railroad had no control over or right to direct the manner in which the logs were unloaded, it certainly wanted protection against any act of the Lumber Company irrespective of how damages might accrue or how and in what manner it might be called upon to answer or pay for such damages; that is the clear interpretation of the provisions of the lease.

In this case, however, there was no negligence on the part of the Union Pacific Railroad Company. It was held liable to Powell because of the acts and conduct of the Lumber Company, who had possession of the premises and who was performing the act of unloading the logs by and through its Agent Bedal, and who had made a safe place unsafe.

The Union Pacific was held liable on the theory that it had not furnished Powell with a safe place in which to work. This was a non-delegable duty which it owed to Powell irrespective of who made it unsafe. *Booth-Kelly Lumber Company vs. Southern Pacific Company*, supra, page 911, Note 7.

Snohomish County vs. Great Northern RR Company
(9 Cir.) 130 Fed. (2d) 996;

Burris vs. American Chicle Co.
(2d Cir.) 120 Fed. (2d) 218;

Standard Oil Company vs. Robins Dry Dock and Repair
(2d Cir.) 32 Fed. (2d) 182.

In the last case cited the court, after referring to three cases, said:

> "In all three of those cases a third party had recovered against a person who was under a non-delegable duty to furnish a safe place to such third person, but in each case the primary and affirmative wrong was occasioned by the defendant against which indemnity was sought."

In *Govero vs. Standard Oil Company* (8 Cir.) 192 Fed. (2d) 962, 964, the court said:

> "We know of no public policy which would prevent a landlord and a tenant from agreeing that the tenant should assume, and agree to indemnify the landlord against, the risk of loss, damage and injuries occurring on the premises during the term of the lease, whether due to the negligence of the landlord or not."

The court then cites the United States Supreme Court case of Sante Fe RR Co. vs Grant Brothers Construction Company, supra, to the effect that the highest public policy is found in the enforcement of the contract which was actually made.

Appellant refers to Section 13 of the lease as containing the word "negligence" whereas Section 5 does not. The reason for this is obvious. Section 13 relates to dangers of fire set out by the railroad where it would be the acter and protects

against loss to lessee's property arising from such fires and nothing else. While the word "negligence" appe ars, it wouldn't be necessary. Any other phrase would cover the situation and be equally effective. Section 5 relates to all other damages and is clear and explicit that the Lumber Company agrees to indemnify the Railroads for damages and judgments in any manner accruing by reason of the use and occupation of the premises, or from any cause whatsoever growing out of said lessee's use thereof. This language is so clear and unambiguous that to insert or add the word "negligence" or "employee" as appellant infers should be in the section would certainly add nothing by way of intent or clarity.

Appellant's sole theory appears to be that the court construed the lease to protect the railroads against their own negligence. No where in the record is there any foundation for such a conclusion. As a matter of fact, and as we have stated, the lease in this particular case protects the railroads against the act and conduct of the Lumber Company and its Agent Bedal, and without which Powell would not have been injured. The statement of the court that he found for the Union Pacific Railroad Company under the contract "and on account of the negligence found to have existed on the premises" (R 234-235) plus Finding of Fact No. XI (R 97) and which finding is supported by all of the evidence—there is no contrary evidence—appellant's theory that the court construed the lease to protect the railroads against their own negligence has no foundation. The provisions of the lease are broad enough, and exceptionally clear, to protect the railroads if they were in fact negligent, but they were not.

As stated, the Union Pacific was held liable to Powell because it had a nondelegable duty to provide him with a safe place to work, which place of work was made unsafe by the *active* conduct of the Lumber Company and its Agent Bedal and not by any act of the Union Pacific.

We can see no difference in principle between the indemnity agreement considered in the Booth-Kelly case and the provision contained in section 5 of the agreement in the case at Bar. except that Section 5 of the agreement herein is more inclusive and more clear that The Hallack and Howard Lumber Company must hold harmless and protect the Railroads from damages, judgments, injuries or loss by reason of the use or occupation of the premises "or from any cause whatsoever growing out of said lessee's use thereof." The agreement in Booth-Kelly case required the same thing, except different language was used.

In any event we think no one can read the provisions of Section 5 and have any misconception about the intent of the language used or what it covers, and certainly there is no dispute here between the Railroad Companys and the Lumber Company with reference to this section of the lease, because the Union Pacific Railroad Company obtained a judgment against the Lumber Company based upon this theory, and with which judgment the Lumber Company is satisfied.

We think appellant misconceives or misconstrues the difference between contribution and indemnity. Here the Railroad Company and the Lumber Company or its agent Bedal were not in pari delicto. The primary duty of unloading the

logs and to see that they were properly unloaded was that of the Lumber Company or its agent Bedal. The Railroad had no duty to perform in that connection and accordingly performed no duty. We think there can be no doubt but that Powell could have sustained an action for negligence directly against the Lumber Company or Bedal, and, as the trial court remarked, had it not been for the Federal Employers Liability Act the action probably would have been filed against Bedal instead of against the Union Pacific (R 253).

That appellant misconceives or misconstrues the difference between the law of contribution and the law of indemnity under the facts in this case is made apparent by the decisions of this court in the Booth-Kelly case on pages 908-910 of the opinion, by the decision of this court in Snohomish vs. Great Northern Railroad Company, 130 Fed. (2d) 996, and others.

Appellant says that in the Booth-Kelly case the industry had violated a specific provision of the agreement. The Lumber Company in the case at Bar in effect did the same thing. It created a dangerous condition, which it should not have done, which caused the Union Pacific Railroad Company to be mulcted in damages without its fault and by which Section 5 of the lease required indemnity.

It matters not that Powell might have actually been a foot or two off the leased premises. His injuries arose out of the use and occupation of the leased premises.

Kokusai Kisen Kabushki Kaisha vs. Columbia S. Co. 23 Fed. Supp. 403, 405, affirmed 100 Fed. (2) 1016;

Booth-Kelly Lumber Company's act was found to have been the active, direct and primary cause of the injuries to Powers and so, in the case at Bar, the court found that the Union Pacific Railroad Company was guilty of no active negligence, which was correct, and found that the active, direct, proximate and primary cause of Powell's injuries was that of the Lumber Company (R 97), and that is correct, because the evidence is all one way that the injuries to Powell occurred when the Lumber Company through its Agent Bedal was unloading the logs onto the leased premises, possession of which it had. The railroads had nothing to do with any of such activities.

Appellant cites cases on pages 90, 93 and 94 of its Brief, all of which cases we have reviewed, and none of them, or as a matter of fact none of the cases cited elsewhere in appellant's Brief, contain provisions that are as clear and unambiguous as are the provisions of Section 5 of the lease herein discussed.

In the Jensen (it should be Jansen) case, the owner who had leased the premises to Jansen had control over the stairs and there was no obligation on the part of Jansen to make alterations, but only to repair. The obligation was upon the owner, not Jansen, to make the steps comply with the City Ordinance.

In the Kay case on page 93 of appellant's Brief the indemnity agreement referred to an overhead loading machine, but the person injured struck a draw bridge, which was not mentioned in the agreement.

The cases referred to on page 94 of appellant's Brief are clearly distinguishable.

In the Martin case the clause upon which plaintiff relied for indemnity was so limited that it could only be construed to be effective to release the lessor of any claim the lessee had. The court indicated that if it had been drawn to release claims of others the result would have been different.

In the Foster case, this case was affirmed by the Court of Appeals in 201 Fed. (2d) 727, in which the facts are more fully shown than in the District Court's opinion, and in addition to active negligence on the part of the Can Company there was also active negligence on the part of the Railroad Company, that is, concurrent negligence. The Railroad was negligent because of insufficient lighting and uneven track. The court of appeals said that the Booth-Kelly case was not applicable because in that case the Lumber Company was primarily liable and the Railroad only secondarily liable.

In the Westinghouse Electric Elevator Company case the contract specifically limited indemnity to acts or omissions of appellee's agents, servants or employees.

In the Glenns Falls Indemity Company case the contract only protected against claims which arose out of performance, non-performance or mal performance of a contract to provide a gunite job on the exterior face of a substation. The injuries to the person involved did not fall within the provisions of the contract and the court found the indemnitee was primarily at fault and was guilty of active negligence not merely passive negligence.

In the Sinclair Prairie Oil Company case the agreement was not clear, and the jury held Sinclair liable and absolved Engle from any negligence.

In the Southern Railway Company case the indemnity clause particularly excepted Coca Cola from liability unless it was at fault. The court said Coca Cola would have been liable had it not been for the exception. The Railroad in that case was admittedly negligent and Coca Cola was not.

The case of *Southern Pacific Company vs. Layman*, 173 Ore. 275, 145 Pac. (2d) 295, had no application in the Booth-Kelly case, and it has none here. In the Layman case the accident involving the harvesting machine happened solely as a result of the Railroad's negligence in the operation of its train.

Thus far it has been demonstrated that appellant has been arguing directly in the face of the Booth-Kelly decision, and he continues to do so; arguing that the Union Pacific Railroad Company acquiesced in the dangerous condition and accordingly was a joint tort feasor and cannot have indemnity. If such an argument possesses any soundness it applies only so far as the case of the Lumber Company vs. Bedal is concerned and it cannot affect the final and binding judgment of the Union Pacific Railroad Company as against the Lumber Company; but in any event appellant's argument proceeds upon the theory that the Railroad acquiesced in the dangerous condition—meaning the unloading of the logs.

Who created the dangerous condition? So far as the railroads are concerned it was The Hallack and Howard Lumber

Company by and through its Agent Bedal. He was unloading the logs. He was the active participant. The Union Pacific Railroad Company was held liable to Powell not because it acquiesced in any such dangers but because it owed a non-delegable duty to furnish Powell a safe place to work, and the Lumber Company, through Bedal, had made it unsafe. The Railroad was not the acter; at most its negligence was merely passive, and it was held responsible to Powell for failing to warn him that the logs were to be dropped or to get out of the way; the same reason for holding the Southern Pacific Railroad Company liable to Powers for failing to warn him of the presence of the wood cart. Booth-Kelly Lumber Company made the same argument of acquiescence as appellant herein makes. This court in the Booth-Kelly case disposed of that contention in a few words:—

> "Thus the situation was one precisely within the words of section 95, supra. Southern Pacific was held liable because of its 'negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other', i.e. of Booth-Kelly. That this is the type of case which the compilers of section 95 had in mind is made clear by their comment on the section, (95a). The court's finding that defendant's negligence was the 'active, driect, proximate and primary' cause, negatives the existance of the acquiescence mentioned in the later portion of the comment." page 911, 183 Fed. (2d).

This finding was supported by the facts, and the same finding in the case at Bar is supported by the facts. To iterate, it was only because of the acts and conduct of the Lumber

Company and its agent Bedal that the Union Pacific Railroad Company was held liable to Powell, and the Union Pacific Railroad Company is entitled to full indemnity the same as was the Southern Pacific Company.

Following the above quoted portion from the Booth-Kelly case this court said:

> "We hold that the contract provides that in the circumstances here existing, and thus found by the Court, Southern Pacific was entitled to the full indemnity it claims. It would have been entitled to no less, under the rule in the Astoria case, supra, even in the absence of a contract."

Acquiescence, of course, is not in the case, but certainly the Railroads did not acquiesce in the cutting or splintering of the logs when they were cut and felled in the forest and that was probably the reason the slab broke off and struck Powell when the logs were dumped (R 206-218).

In addition to the Booth-Kelly case and others which we have cited supporting the judgment of Union Pacific Railroad Company against The Hallack and Howard Lumber Company, we respectfully refer also to the following:—

Culmer vs. Baltimore & O. R. Co.,
1 F. R. D. 765;

Watkins vs. Baltimore & O. R. Co.,
29 Fed. Supp. 700;

Deep Vein Coal Company vs. Chic. & E. I. Ry Co.
(7 Cir.) 71 Fed. (2d) 963;

Waylander—Peterson Company vs. Great Northern Ry Co.
(8 Cir.) 201 Fed. (2d) 408.

In the *Waylander-Peterson Company vs. Great Northern Ry Company* case the court, in approving the views of the trial court, stated that the railroad's laibility arose because of a non-delegable duty, and that—

> "The primary duty rested upon Waylander-Peterson Company to perform its work on the bridge so as not to endanger the workmen who were required to work in proximity thereto. Its neglect was the primary, active cause of Lawrence's injuries. The Railroad Company's negligence, as between the parties, was secondary and passive."

Incidentally the court refers to Restatement on Restitution, Sections 95, 95a, also referred to in the Booth-Kelly decision.

SUCH CONTRACTS WITH WHICH WE ARE CONCERNED HERE ARE NOT AGAINST PUBLIC POLICY.

Booth-Kelly Lumber Company vs. Southern Pacific
(9 Cir.) 183 Fed. (2d) 902; 20 A.L.R. (2d) 695;

Snohomish County vs. Great Northern RR Company
(9 Cir.) 130 Fed. (2d) 996;

Griffiths vs. Broderick
(Wash.) 182 Pac. (2d) 18, 175 A.L.R. 1;

42 C.J.S. 572, Sec. 7;

27 Am. Jur. 459, Sec. 8.

THAT BEDAL WAS AN INDEPENDENT CONTRACTOR DOES NOT RELIEVE THE LUMBER COMPANY OF ITS LIABILITY TO THE RAILROAD COMPANY UNDER THE LEASE.

The mere fact that as between the Lumber Company and Bedal, Bedal was an independent contractor, does not relieve the Lumber Company of its obligation to the Railroads under the lease agreement or independent of the lease.

See—Note 7, page 911 of 183 Fed. (2d), the Booth-Kelly case.

> "He cannot escape liability by letting work out like this to a contractor and shift responsibility on to him if any accident occurs."

Chicago vs. Robbins,
67 U.S. 418, 17 L. Ed. 298;

Robbins vs. Chicago,
71 U.S. 4 Wall 657, 18 L. Ed. 427, 430;

George A. Fuller Co., vs. Otis Elev. Co.,
245 U.S. 489, 62 L. Ed. 422;

Fegles Cons. Co., vs. McLaughlin Const. Co.
(9 Cir.) 205 Fed. (2d) 637;

Burris vs. American Chicle Co.,
(2 Cir.) 32 Fed. (2d) 182;

Standard Oil Co., vs. Robbins Dry Dock & Repair Company
(2 Cir.) 32 Fed. (2d) 182;

Dallas & G. R. Co., vs. Adle
(Tex.) 9 S.W. 871, 876;

Shearman & Redfield on Negl.
5th Ed. Sec. 14;

57 C.J.S., Sec. 587 p. 357;
27 Am. Jur. 515, Sec. 38.

The lease in question was never assigned by the Lumber Company to Bedal. The Lumber Company was in control and had the exclusive possession of the leased premises.

> "A party to a contract may assign rights under it, but he cannot assign obligations." *Pioche Mines Consol. vs. Fidelity-Philadelphia Trust Company* (9 Cir.) 202 Fed. (2d) 944.

IMPLIED INDEMNITY

While the Railroads action against the Lumber Company is based primarily upon the indemnifying agreement which we have been discussing, nevertheless the Railroads proceeded also on the theory that the Lumber Company was liabile to the Union Pacific Railroad Company under implied indemnity and independent of said lease. See paragraph IX of the Railroads' Complaint (R 6-7).

Booth-Kelly Lumber Co., vs. Southern Pacific Co., supra;

Snohomish County vs. Great Northern Railway Co. (9 Cir.) 130 Fed. (2d) 996;

Washington Gas Light Company vs. District of Columbia (161 U.S. 316, 40 L. Ed. 712);

George A. Fuller Company vs. Otis Elevator Co., 245 U.S. 489, 62 L. Ed. 442;

Burris vs. American Chicle Co., (2 Cir.) 120 Fed. (2d) 218;

Southwestern Bell Telephone Co., vs. East Texas Public S. Co., (5 Cir.) 48 Fed. (2d) 23;

Waylander-Peterson Co., vs. Great Northern Ry. Co., (8 Cir.) 201 Fed. (2d) 408.

All of the facts which are in this case and are undisputed and which we have previously been discussing fully justify the findings of the court, conclusions of law, and the judgment in favor of the Railroads and against the Lumber Company on the theory of implied indemnity.

As mentioned in the Booth-Kelly case, the Southern Pacific was entitled to full indemnity and "it would have been entitled to no less, under the rule in the Astoria case, supra, even in the absence of a contract." And, as stated in Burris vs. American Chicle Company, supra—

> "It is immaterial that there was no express provision for indemnity in the contract between these parties."

In *Snohomish County vs. Great Northern Railway Company*, supra, this court said:

> "If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

See also—*Baillie vs. City of Wallace*,
24 Ida. 706, 135 Pac. 850, 854.

CONCLUSION

We think there can be no question about the binding and conclusive effect of the judgment of the Union Pacific Railroad Company against The Hallack and Howard Lumber Company, and that the judgment must be affirmed, and with respect to that judgment Bedal's appeal should be dismissed.

We submit that the facts in this case being clear and undisputed establish without any question the liability of the Lumber Company to the Railroads, for it was by and through its Agent Bedal that the logs were cut and felled in the forest, hauled to Banks and unloaded, and that during the un-

loading of the logs Powell was injured, for which, through no fault of the Union Pacific Railroad Company it was compelled to pay damages for Powell's injuries.

Section 5 of the lease could not be clearer than it is if any other words were used. There is no dispute in this case between the Railroads and the Lumber Company as to Section 5 being applicable. The language is clear that the Lumber Company agrees to hold the Railroads harmless and to protect the Railroads from damages or judgments which accrue in any manner by reason of the use or occupation of the premises or from any cause whatsoever growing out of said lessee's use thereof. No clearer language could be used to indicate liability of the Lumber Company to the Railroads for indemnity relating to any loss or damage the railroads sustained because of the use and occupation of the leased premises.

Here the parties were on an equal footing, free to contract with respect to liability, or anything else.

In *John P. Gorman Coal Company vs. Louisville & N.R.* Co. (Ky) 281 S.W. 487, in addition to what has been quoted from the case previously herein, the court said:—

> "The appellee (railroad), by this contract, was not attempting to contract against its common law liability for negligence: It was simply providing for such liability. * * * it was not compelled to construct this switch (neither was the Union Pacific and Oregon Short Line required to give a lease to The Hallack and Howard Lumber Company). * * *As here involved, these obligations simply put the appellant in the position of an insurer of appellee's possible lia-

> bilities arising out of the maintenance and operation of this spur track. This contract did not, nor could it, exonerate the appellee from responding in damages to those injured by its negligence. * * * But having so responded, the appellee had the right to look for reimbursement to the one who had agreed to insure it, so to speak, against such loss."

There, of course, is no question raised, and none can be raised, but that The Hallack and Howard Lumber Company is bound by the record and judgment made in the Powell case, and also in this case, for it has not appealed. But in the Powell case, when the trial court ruled upon the Motion of the Union Pacific for Judgment. Notwithstanding the Verdict, Judge Clark found that Powell was struck by a slab from a log being unloaded from a truck on the road some twenty feet above the location of the bunkers where the logs were loaded on the train, and then stated,—

> "Whether the operation in driving the trucks to the top of this steep enbankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury." (R 141, 142).

This was the operation of The Hallack and Howard Lumber Company by and through its Agent Bedal (Ex. 3 R. 154-156, 170), so that the findings of the court to the effect that The Hallack and Howard Lumber Company by and through its Agent Bedal was negligent and that that is what caused the injuries to Powell puts the matter at rest completely, both under the lease, Section 5, and also on the basis of implied indemnity.

The Railroads and the Lumber Company were not joint tort feasors; the primary cause of the accident to Powell was the fault or negligence of the Lumber Company.

See—*States SS Company vs. Rothschild International Steve. Company* (9 Cir.) 205 Fed. (2d) 253.

That the judgment in favor of the Union Pacific Railroad Company against The Hallack and Howard Lumber Company should be affirmed is,

Respectfully submitted,

BRYAN P. LEVERICH
L. H. ANDERSON
E. H. CASTERLIN
E. C. PHOENIX
Attorneys for Appellees,
Oregon Short Line Railroad Company, Union Pacific Railroad Company.

No. 14,197

IN THE

United States

Court of Appeals

For the Ninth Circuit

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vs.

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and

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REPLY BRIEF OF APPELLEE, THE HALLACK AND HOWARD LUMBER COMPANY

OSCAR W. WORTHWINE
and
J. L. EBERLE
Idaho Building
Attorneys for Appellee,
The Hallack and Howard
Lumber Company

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OSCAR W. WORTHWINE
and
J. L. EBERLE
Idaho Building
Attorneys for Appellee,
The Hallack and Howard
Lumber Company

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REPLY BRIEF OF APPELLEE, THE HALLACK AND HOWARD LUMBER COMPANY

I

STATEMENT OF THE CASE

Appellant, W. O. Bedal, is a Third-Party Defendant, an independent logging contractor, who, in unloading logs as such for Appellee, The Hallack and

Howard Lumber Company, caused injuries to an employe of Appellees, Oregon Short Line Railroad Company and Union Pacific Railroad Company, who, upon judgment being rendered premised upon the negligence of said Bedal, in favor of such employee and against them, brought this action of indemnity against Appellee, The Hallack and Howard Lumber Company, which in turn made said Bedal a Third-Party Defendant as its indemnitor and the original wrong-doer and the only active participant causing such injuries, whose negligence had been adjudicated, and therefore, he should respond in full for the judgment that has been rendered in this case against Appellee, The Hallack and Howard Lumber Company.

Hereinafter in this brief the Appellees, Oregon Short Line Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, will be referred to as 'Railroads', and Appellee, The Hallack and Howard Lumber Company, a corporation, will be referred to as 'Lumber Company', and W. O. Bedal, Appellant, will be referred to either as 'Appellant' or 'Bedal.'

On March 3, 1944, the Railroads entered into a lease with the Lumber Company for a log loading site at Banks, Idaho (R. 10), which lease contained the usual indemnity agreement on the part of Lessee. On March 31, 1945, the Lumber Company entered into a logging contract with the Appellant and Owen S. Smith (R. 27, ex. 8) which contract was amended from time to time and finally Appellant was substituted for and in place of himself and Owen S. Smith

(R. 47). The logging contract contained an indemnity agreement which will hereinafter be set out in full.

On September 15, 1949, while the lease from the Railroads to the Logging Company and the logging contract between the Lumber Company and Appellant were in full force and effect, A. M. Powell a car inspector employed by the Railroads was seriously injured by a slab or splinter flying from a log being unloaded by Appellant and striking said Powell, which later resulted in a judgment in favor of Powell and against the Railroads, which the Railroads paid.

Thereupon this action was instituted by the Railroads against the Lumber Company, and the Lumber Company, under Rule 14, brought Bedal into the case as a Third-Party Defendant. In its Third-Party complaint, and particularly in paragraph X thereof, the Lumber Company charged as follows:

> "That on or about the 13th day of April, 1950, the said A. M. Powell, by an instrument in writing, notified this Defendant and Third-Party Plaintiff about his said claim against the Union Pacific Railroad Company and this Third-Party Plaintiff arising out of the facts set forth above herein.
>
> "That on April 24, 1950, this Defendant and Third-Party Plaintiff, by letter, notified the said W. O. Bedal, the Third-Party Defendant, that it had received the written claim from the said A. M. Powell, and at that time forwarded to the said W. O. Bedal a copy of the claim asserted by the said A. M. Powell.

"That on or about the 3rd day of October, 1950, the said A. M. Powell filed the action in the United States District Court, for the District of Idaho, Southern Division, referred to in the complaint of the Plaintiffs in this action.

"That on or about January 10, 1951, this Defendant and Third-Party Plaintiff, in writing, by registered mail, notified the said W. O. Bedal, the Third-Party Defendant, of the filing of said complaint by the said A. M. Powell, and enclosed therewith a copy of the said complaint filed by the said A. M. Powell, and at that time and in that manner notified the said Third-Party Defendant, W. O. Bedal, among other things, as follows:

> " 'This letter is to advise you that the Hallack and Howard Lumber Company will look to you and your insurance carrier to hold harmless the Hallack and Howard Lumber Company from any liability whatever in this matter.'

all of which more fully appears from a copy of that certain letter from the Attorneys for the Defendant and Third-Party Plaintiff, Messrs. Phelps & Phelps, Denver, Colorado, who, at the time, were acting for this Defendant and Third-Party Plaintiff, a copy of which letter is hereto attached and marked Exhibit 'F,' and by this reference is hereby made a part hereof. (For letter see R. 52-53.)

"That the said W. O. Bedal, the Third-Party Defendant, failed and refused to defend the case of A. M. Powell against the Union Pacific Railroad Company, and failed and refused to pay the claim of the said A. M. Powell, and has failed and refused to hold this Third-Party Plaintiff harmless.

"That the said cause of A. M. Powell, Plaintiff, versus the Union Pacific Railroad Company, Defendant, was tried in the above-entitled Court before the Court and jury commencing on the 26th day of February, 1951." (R. 62-63)

Thereafter, the Appellant answered said Third-Party Complaint and admitted each and every of the above-named allegations.

In paragraph IX of its Third-Party Complaint the Lumber Company charged as follows:

"That this Defendant and Third-Party Plaintiff on October 14, 1952, by an instrument in writing, tendered the defense of this action to the said W. O. Bedal, and his insurance carrier, the Truck Insurance Exchange, and they severally refused to defend it; that a copy of said tender is attached hereto as Exhibit 'E'." (R. 23) (For letter see R. 49-51.)

and this was likewise admitted.

In his answer to the Third-Party Complaint Appellant stated:

> "In answer to paragraph IV of said Third-Party Complaint Third-Party Defendant admits that he was operating under said contract as an independent contractor;" (R. 75)

A request for admission was served on Bedal (R. 155) and Bedal admitted:

> "That the injuries to the said A. M. Powell at Banks, Idaho, on the 15th day of September, 1949, were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leased premises." (R. 155-156)

Bedal also admitted:

> "Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit 'A' attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party Complaint;" (R. 159)

After the jury had returned a verdict in favor of A. M. Powell and against the Railroads the Railroads made a Motion for Judgment Notwithstanding the Verdict (R. 136-140; ex. 2), and in ruling on that Motion in the case of Powell vs. Railroads the District Judge ruled as follows:

"Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A 'Cat' and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.

"Whether the operation in driving the trucks to the top of this steep embankment, pushing the logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

> "If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable (Ellis vs. Union Pacific Railroad Company, 329 U. S. 649)." (R. 141-142)

On September 22, 1953, the Railroads filed Findings of Fact and Conclusions of Law (R. 92). These Findings and Conclusions were later amended by Order of the Court (R. 112-113), and instead of reading as they do in the printed transcript of record, Finding No. III should read as follows:

> "That on the 15th day of September, 1949, the aforesaid lease agreement was in full force and effect, and that at Banks, Idaho, on said date, while the defendant, *by and through, W. O. Bedal, an independent contractor, his* agents, servants or employees were unloading logs on or onto said leased premises and using and occupying said premises in accordance with the terms and conditions of said lease a piece of timber broke off one of the logs being unloaded from a truck and struck one, A. M. Powell, a car inspector employed by the Union Pacific Railroad Company, seriously injuring the said A. M. Powell." (R. 112-113)

Likewise, in Finding No. XI (R. 97), as amended by order of the Court, in the eleventh line thereof in

the printed record the word 'agent' was stricken, and in lieu thereof, the words 'independent contractor' were inserted; and likewise, in Finding No. XI (R. 97), in the eighth line from the bottom of the page of the printed record (R. 97), the word 'its' was stricken, and in lieu thereof, the words "by and through W. O. Bedal, his" was inserted; so that, as amended by order of the Court, Finding No. XI (R. 97) should read as follows:

> "That the plaintiffs or either of them had no duties to perform in connection with either the unloading or the loading of logs at Banks, Idaho, and at the time and place Powell was injured were performing no part of the work of unloading or of loading the said logs. That the unloading of the logs onto said leased premises and the loading of said logs from said leased premises onto the cars of the plaintiffs were performed solely and entirely by the defendant The Hallack and Howard Lumber Comppany by and through its *independent contractor*, the said W. O. Bedal. That the said Union Pacific Railroad Company was held liable for the injuries sustained by the said A. M. Powell only because it had not furnished Powell a safe place within which to perform his work, a duty which was nondelegable as between the Union Pacific Railroad Company and the said Powell. That the said unsafe place was created by the fault or negligence of the defendant The Hallack and Howard Lumber Company, *by and through*

W. O. Bedal, his agents, servants or employees, and the said Union Pacific Railroad Company was guilty of no active negligence; *that the active, direct, proximate and primary cause of said Powell's injuries* was that of the defendant The Hallack and Howard Lumber Company acting by and through its agent, the said W. O. Bedal, in unloading said logs in the manner and under the circumstances hereinbefore referred to." (Emphasis ours.)

At the time of the trial of this case, U. R. Armstrong was called as a witness for Hallack and Howard, and testified that he had been General Manager for Hallack and Howard for 39 years; that he had charge of the company's operations at Cascade, Idaho, in 1949; that Hallack and Howard had entered into a logging contract, which was identified and admitted in evidence as Exhibit 8; that certain bunkers at Banks, Idaho, were put in by Bedal; that Hallack and Howard had nothing whatever to do with the installation of the bunkers; that during 1949 Hallack and Howard had nothing to do with the loading or unloading of logs at the Banks landing; that Bedal had the function of loading and unloading the logs; that Bedal cut the logs in the forest, loaded those logs on trucks, and brought them to the log landing at Banks, Idaho, and that Hallack and Howard did not take any part in the loading or unloading of the logs at Banks in September 1949; that Hallack and Howard did not employ any of the men working there; that Hallack and Howard had

nothing to do with the employees of the logging contractor, the Third-Party Defendant Bedal, and nothing to do with the logging operation at Banks in September 1949 (R. 236-240).

The above evidence was undisputed and uncontradicted and Appellant Bedal did not place any witness on the stand to testify in regard to this matter and made no offer of proof of any kind or character.

Appellant, when brought in as a Third-Party Defendent, filed an answer to the complaint of the Railroads in this action (R. 72-74), and at the trial of the instant case Appellant appeared and was represented throughout said trial by his Attorneys and cross-examined one witness (R. 171-172), and in the case of the Railroads against the Lumber Company Appellant offered no evidence (R. 234).

In the case of the Lumber Company against Bedal it was stipulated that Mr. L. H. Anderson, who was counsel for the Railroads in the case of Powell vs. Railroads, and had charge of the litigation, if called upon to testify, would testify as follows:

> "That he would testify that in the Powell case, he at that time was counsel for the defendant and that he had charge of the litigation and that if either Bedal or his insurance carrier or anyone else on his behalf had offered to take over the defense or to assist in the same that Mr. Anderson and his client would have accepted such defense or assistance." (R. 236)

When the Lumber Company called Mr. U. R. Armstrong to testify as hereinbefore set forth, Coun-

sel for Appellant attempted to go into matters that were foreign to the direct testimony given by Mr. Armstrong, to which there was an objection made on the ground that the question embraced matters which were not proper cross-examination, and the Court ruled it was inadmissable for, among other reasons, it was not proper cross-examination (R. 240), and without producing a single witness or offering any testimony other than that which was in the record in the Powell case, the Appellant rested (R. 241).

In directing the verdict in favor of the Lumber Company the District Judge said:

> "Had it not been for the Act of Congress known as the Railroad Employees Liability Act, this action originally no doubt, would not have been filed against the Union Pacific Railroad Company, it would probably have been filed didectly against W. O. Bedal the independent contractor who caused the injury. His conduct, in view of the fact that he was the acting party throughout this entire case although it isn't a case of estoppel under the law, it is a case of equity or equitable estoppel at least, because he sat idly by and let the party whom he was doing the work for, the Hallack & Howard Lumber Company become liable here. The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company, and they are the ones who were responsible to the Railroad Company and the Railroad Company was

liable and the jury in the case that was tried heretofore found that this was an act of negligence and brought in a verdict against the Union Pacific Railroad Company. Should W. O. Bedal after all these proceedings be allowed to gamble on another jury's verdict which may be different from the jury's verdict already returned in this Court. The first jury found that it was negligence to drop these logs off and let them roll down this hill unrestrained as they were, which caused the slab to break off, which injured Powell. It would be a mockery on (106) justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another ajudication.

"This has been a very difficult matter for the Court, I felt that in rendering judgment of $18,334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Company and I found it necessary under the law to do that, * * *" (R. pp. 253-254-255)

II

POINTS AND SUMMARY OF ARGUMENT

A. Bedal in handling logs as an independent contractor for Lumber Company, injured Powell, an employee of Railroads, on their premises leased by Lumber Company, but under exclusive control of Bedal, whose conduct and acts were the sole cause of such injury, and Bedal must therefore ultimately respond for the same.

B. In Powell's suit against Railroads, based on non-delegable duty as a passive participant, there were no allegations nor proof of any acts or conduct upon which any liability or negligence could be, or was, based, other than that of Bedal who was the sole wrong-doer.

C. Bedal had knowledge of the Powell suit, refused to defend it, and is, therefore, bound by all facts necessary to the finding of the jury and Court of negligence in the handling of the logs involved, and is not entitled to relitigate such facts, especially inasmuch as Bedal offered no proof in the case at bar additional to that in the Powell case, and that the Court in this case also tried the Powell case and upon the same evidence held that Bedal had been negligent as found by the jury.

D. The Railroads recovered in this suit against the Lumber Company for whom Bedal was an independent logging contractor not only on an express indemnity, but also upon implied indemnity in that Lumber Company also had a non-delegable duty, and although a passive participant, was liable over as an indemnitor in equity.

E. Inasmuch as Bedal, as the independent logging contractor of Lumber Company, had complete and exclusive control of the operations of handling the logs involved, and in view of the potential danger and possible liability involved, it was not only natural, but necessary that Lumber Company take from Bedal an express indemnity agreement, which it did, specifically providing that under no circumstances or conditions should the Lumber Company be liable for any claims whatsoever incurred by Bedal, and hence Bedal was obligated to indemnify the Lumber Company against the judgment in favor of Railroads.

F. The Lumber Company is the only innocent party—not even a passive participant, excepting only insofar as Bedal was its independent contractor—and there is an implied indemnity on the part of Bedal to indemnify Lumber Company against the judgment against it, premised upon the principle that everyone is responsible for the consequences of his own wrong, and in equity and in good conscience, since judgment was rendered against the Lumber Company on account of the wrong of Bedal, the latter received a benefit at the expense of the former, the retention of which is unjust.

G. The rulings of the trial Court are amply sustained by the evidence, and the Scintilla of Evidence rule is not applicable in the Federal Courts; it is well established that where the trial Court would be compelled to set aside an adverse verdict, it was its duty to grant a motion for a directed verdict.

H. The Powell case conclusively established the negligence of Bedal as the sole, active cause of the injury to Powell, and Bedal, having refused to defend the same, is bound thereby as if he had been a party thereto, there being no allegations or proof in said case of any acts or conduct other than those of Bedal upon which a judgment could be, or was, based, and such facts being essential prerequisites to the judgment against the Railroads, therefore Lumber Company is entitled to liability over as to Bedal.

I. The rule of implied indemnity is in full force and effect in Idaho and has been sustained by this and other Courts premised upon the principle that everyone is responsible for the consequences of his own wrong and if another is held legally liable, regardless of the basis of such liability, and compelled to pay that which the wrong-doer should have paid, the latter becomes liable to the former.

J. As the trial Court found, the Lumber Company is the only innocent party to the action and should not be compelled to pay for the wrong of Bedal; and when the acts and conduct of said Bedal were adjudicated in the Powell case as the sole and active negligence of Bedal, he cannot again re-litigate the same merely by asking to have another jury pass on the same evidence that was before the first jury in the Powell case, which found Bedal negligent, particularly where the Court would have had to hold again as it did in the Powell case that the only primary and active negligence was that of Bedal; accordingly, Bedal must ultimately pay for injury to Powell and be liable over to the Lumber Company for the judgment against it by the Railroads herein.

K. Since Bedal has admitted that he 'failed and refused' to defend the Powell case no tender was necessary.

III

ARGUMENT

A. APPELLANT BEDAL IS LIABLE TO APPELLEE LUMBER COMPANY BY REASON OF HIS CONTRACT OF INDEMNITY.

We urge that the judgment secured by the Lumber Company should be sustained by reason of the indemnity agreement contained in the logging con-

tract (Ex. 8; R. 27-48). In said logging contract it was agreed as follows:

> "It is further stipulated and agreed that under no circumstances or conditions is the party of the first part (Lumber Company) to become liable for any claims whatsoever which may be incurred by the parties of the second part (Bedal) or any of their agents, servants or employees in carrying out this contract, and under no circumstances shall this agreement be considered as a partnership agreement, nor shall the parties of the second part (Bedal) be considered by this contract, or any interpretation thereof, to be the agents of the first party, (Lumber Company) and it is understood and agreed that this is what is commonly termed and called an independent contractor's agreement." (R. 33)

and said logging contract further provided:

> "Second parties (Bedal) further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party (Lumber Company) in case of possible accident involving persons or property not connected with or owned by the parties to this contract. Second parties (Bedal) further agree that the use of their trucks on the public roads shall be in strict compliance with the state regulations governing such use,

and will at their own expense provide each truck with all equipment for safe operation and comply with all the rules and regulations of the United States and the State of Idaho, and any and all rules and regulations promulgated by said United States or the State of Idaho or any bureau or agency thereof." (R. 35-36)

The logging contract also provided that Bedal should carry workmen's compensation as follows:

> "The parties of the second part (Bedal) agree to procure in a manner satisfactory to the officers of the State of Idaho having charge of the administration of the Workmen's Compensation Act, workmen's compensation for all of his (Bedal's) employees to be employed in said logging operations, and also to comply fully with all federal and state laws, rules and regulations regarding compensation of employees."

The contract also provided that Bedal should keep all roads in repair; the provision being:

> "Second parties (Bedal) further agree to do all necessary work in building roads and bridges and keeping roads in repair;"

It likewise provided for strict performance thereof by Bedal:

> "It is hereby stipulated and agreed that a strict performance of the terms of this contract by the parties of the second part (Bedal), in

> the time and in the manner and in the method hereinbefore specified is of great importance to the first party (Lumber Company),"

In considering the above provisions it must be kept in mind that the Lumber Company was in no manner responsible for the injury suffered by Powell, nor is there any question but that Bedal was notified of all the steps taken by A. M. Powell. The lower court reviewed these facts in its opinion directing a verdict against Bedal (R. 248-255) and referred to the above quoted stipulations, and then in referring to the contract between the Lumber Company and Bedal, said:

> "Under the terms and provisions of this contract W. O. Bedal was an independent contractor and had charge and control of the premises in question here which was leased by the Union Pacific to Hallack and Howard Lumber Company and it was while the Third party defendant, W. O. Bedal, was unloading logs onto and using and occupying said leased premises under the terms and conditions of the logging contract between him and the Hallack & Howard Lumber Company that the said Powell was injured." (R. 251)

and the Court then recited the various steps which had been taken in keeping Appellant Bedal advised of the claim that was being asserted by A. M. Powell, and then stated:

> "The only innocent party that there is to this lawsuit is the Hallack & Howard Lumber Company," (R. 254)

and likewise stated:

> "It would be a mockery on justice to say that W. O. Bedal, who rolled that log off and caused this injury could come back here and gamble with another jury, and sit idly by and let Hallack & Howard become liable for his acts, and then say that there must be another adjudication." (R. 254)

and the Court also said:

> "This has been a very difficult matter for the Court, I felt that in rendering judgment of $18,-334.15 against Hallack & Howard Lumber, that it was an injustice but they had signed a contract to the effect that they would protect the Railroad Company and I found it necessary under the law to do that, * * *" (R. 254-255)

Counsel for Bedal accepts the general rule of law that a principal is not liable for the acts of an independent contractor, for on page 44 of Appellant's brief, counsel states:

> "(Appellant would like to mention the general principle of law that a principal is not liable for the negligent acts of an independent contractor. This is such a common principle that appel-

> lant does not think it necessary to do other than refer to it. 27 Am. Jur. 504, Sec. 27.)"

Since the above statement is true, what possibly could have been the purpose of inserting in the logging contract the provision for indemnity above quoted?

It will be noted that it was agreed:

> "that under no circumstances or conditions"

was the Lumber Company:

> "to become liable for any claims whatsoever which may be incurred by the parties of the SECOND part. (Bedal)"

Manifestly, the word 'claims' as used in the above indemnity agreement was broad enough to include a contract liability. Likewise, it will be noted that in reference to *claims* the parties used the words "which may be incurred" and the use of the word *incurred* by the parties rendered the clause unambiguous and definitely applicable to *any and all liability, including a contract liability!*

In *Boise Development Co. Ltd. vs. Boise City*, 26 Idaho 347, 143 Pac. 531, the Supreme Court of Idaho said:

> "However, this is unimportant from our viewpoint, because we are not passing upon whether this is a favorable deal for the city, but the question is: Did it incur a debt or liabil-

ity when it executed the same? And we submit that under a fair and reasonable construction of said section of our constitution, it did. If an agreement to perform this vast amount of work does not incur a liability on the part of the city, then the words 'incur' and 'liability' must each be given meanings unknown to lexicographers.

"Black's Law Dictionary, 2d edition, defines the word 'incur' as follows: 'Incur. Men contract debts; they incur liabilities. In the one case they act affirmatively; in the other, the liability is incurred or cast upon them by an act or operation of law.' Bouvier, in his law Dictionary, defines the word 'liability' as follows: 'Responsibility. The state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed. The state of being bound or obliged in law or justice.' "

Boise Development Co., Ltd. vs. Boise City, 26 Ida. 347; 143 Pac. 531.

In the case of *Schwab vs. Schlumberger Well Surveying Corp.*, 168 ALR (Tex) 1074, the Court said:

"The word 'incur' is defined in Ashe vs. Youngst, 68 Tex. 123, 125, 3 SW 454, 455, as 'Brought on,' 'occasioned,' or 'caused.' "

Such definitions of the word 'incur' are common in that even *Webster's Dictionary* defines the same

as: "To become liable, or subject to; to bring down upon oneself." See, also footnote 6 in the case of *Orenberg vs. Thecker*, 143 Fed. (2d) 375, where the word 'claim' is defined:

> " 'Claim' in its primary meaning, is used to indicate the assertion of an existing right."

Here we have an independent contractor entering into a contract to cut, transport and load on railroad cars certain logs; this is known to be a hazardous undertaking and it was quite natural that the Lumber Company—not having control of the operations, and not hiring any of the employees, and not having the right to discharge the same—would desire an indemnity agreement, and that is the reason the above clauses were inserted in the contract; and, furthermore, that is the reason the Lumber Company required Bedal to insure all trucks and drivers to take care of public liability and property damage, the said insurance to specifically name and protect the Lumber Company in case of a possible accident involving persons or property not connected with or owned by either of the Parties. Now, however, the Lumber Company has had a judgment rendered against it for $18,334.15 (R. 103-104) because of an accident suffered by one A. M. Powell, and the sole question of construction is, what was the intention of the Parties when they inserted in the above contract the above quoted provision? Obviously, it was to protect the Lumber Company against the very situation that is now confronting it!

American Jurisprudence states as follows:

> "The interpretation of a contract is the determination of the meaning attached to the words 'Written or spoken' which make the contract. Rules for the interpretation of contracts are not inflexible, their purpose being to reach the probable intent of the parties. In the absence of a statute the only duty of the courts is to discover the meaning of a specific contract and to enforce it without a leaning in either direction when the parties stood on an equal footing and were free to do what they chose. The rules of interpretation are intended for persons of common understanding."
>
> 12 Am. Juris., Sec. 226, p. 745.

The same rule applies to an indemnity contract as is stated by *American Jurisprudence*:

> "While the construction of an indemnity contract may involve a question arising under circumstances calling for its submission to the jury, the question of construction is usually one of law for the court applying recognized rules of construction. The cardinal rule is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand,

be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability within the scope or spirit of their terms."

27 Am. Juris., Sec. 13, p. 462.

The Supreme Court of Idaho has said:

"The substantial intent of the parties governs in interpreting contracts and this is to be determined in view of the agreement as a whole, the matters with which it deals and the circumstances under which it was made."

Caldwell State Bank vs. First National Bank, 49 Ida. 110, at p. 116; 286 Pac. 360.

The Supreme Court of Idaho has also said:

"It is an established rule of law that the construction which sustains and vitalizes a contract is preferred, and should be adopted, rather than one which 'strikes down and paralyzes it'." (United States Fidelity & Guaranty Co. vs. Board of Commrs. of Woodson County, 145 Fed. 144, 76 CCA 114.)

The Court also quoted with approval from the *Woodson County* case the following:

" 'The actual intent and meaning of the parties, when the agreement was made, deduced from the entire contract, from its subject mat-

ter, from the purpose of its execution, and from the situation and circumstances of the parties when they made it, must prevail over the dry words of the instrument, inapt expressions, and careless recitals therein, unless the intention runs counter to the plain sense of the binding words of the agreement'." (United State Fidelity & Guaranty Co. vs. Board of Commrs. of Woodson County (Kan.), supra.)

City of Pocatello vs. Fargo, 41 Idaho 432, at 443; 242 Pac. 297.

In considering the indemnity agreement signed by Appellant it must be kept in mind that there is no rule of public policy which forbade the Lumber Company from contracting with Bedal for indemnity against any liability or damage it might suffer on account of his operations.

See: Buckeye Cotton Oil Co. vs. Louisville & N.R. Co., 24 Fed. (2d) 347 (6 CCA) 1928.

In commenting upon the indemnity agreement in the logging contract, the trial court said:

"The part of this that is so outstanding is 'that the second parties (Bedal) further agree that all trucks and drivers are to be covered by insurance to take care of public liability and property damage, said insurance to specifically name and protect said first party (Lumber Company) in case of possible accident involving

persons or property not connected with or owned by the parties to this contract'." (R. 251)

Here, the Lumber Company had a judgment entered against it because Powell was injured by a slab breaking off a log being unloaded by Bedal and flying through the air a distance of 60 or 70 feet.

Bedal, in his brief at page 82, argues that the Lumber Company is trying to take the words of the indemnity agreement in the logging contract and "so construe them as to protect the Lumber Company *from any loss it might sustain by reason of its separate arrangement with the Railroad,*" and then argues that the only protection the Lumber Company had was insurance protection under the policy to be taken out by Bedal.

There are several answers to this contention:

FIRST: The Railroads sued the Lumber Company, not only upon the contract contained in the lease, but alleged in its complaint that the Lumber Company was liable under the contract, "or independent of said lease" (R. 7), and in its conclusions of law the trial court concluded that the Lumber Company was liable to the Railroads under the lease (or independent of said Lease). This liability, independent of said lease, is based on the familiar doctrine of liability over.

SECOND: There is no exclusion of claims based upon a contract.

THIRD: The Lumber Company was to be protected "In case of possible accident involving persons or

property not connected with or owned by the parties to this contract."

FOURTH: Bedal was in control of the conditions under which the logs were cut, skidded, transported, unloaded, and loaded upon the railroad cars. He had control of the road and the place where the logs were unloaded.

Since Bedal did have such control and the Lumber Company had no control whatsoever over these conditions, it makes it reasonable that the indemnity provisions were inserted in the logging contract in order to have Bedal alone bear the loss, if any occurred.

Is it reasonable to assume that the Lumber Company would turn over all control to Bedal, as it did in this contract, without full and complete indemnity?

It must be kept in mind that the parties stipulated:

> "That a strict performance of the terms of this contract by the parties of the second part (Bedal) * * * is of great importance to the party of the first part (Lumber Company)."

It certainly is unreasonable to assume that the Lumber Company would turn over all these operations to Bedal without indemnity against "*all claims*" growing out of Bedal's operations over which it had no control.

To make such an assumption would do violence to the ordinary rules of self preservation, and it should not be assumed, and the contract should not be so

interpreted so as to make it possible for Bedal, by a single act of negligence on his part or on the part of his employees over whom the Lumber Company had no control, to wipe out the Lumber Company and leave Bedal and his Insurance Carrier go free!

We urge that the cases cited by Appellant (Br. 73-83) in support of Appellant's position that the indemnity agreement does not cover this situation and does not protect the Lumber Company are not in point here.

The first case cited by Appellant is that of *Crawford vs. Pope and Talbot, Inc.*, et al. 206 Fed. (2d) 784. In the first place, this was a case involving an *implied* indemnity, and the Court said:

> "Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party."

and again:

> "The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party."

Appellant, at page 76 of his brief, cites the case of *Smart, et al vs. Morard, et al.*, 124 NYS (2d) 634. In that case a third person sued an employer because of negligence of an employee in driving employer's automobile. The court held the employer could cross-

complain against the employee for indemnity, saying:

> "One liable only by reason of a duty imposed by law for consequences flowing from the negligent conduct of another, and not an actual participant in that conduct, may recover over against the active perpetrator of the wrong."

The above is a quote by the Court from *4 Shearman & Redfield*, Law of Negligence, para. 894, p. 2007 (1941 ed.).

Appellant, at page 78 of his brief, cites the case *of Employers Casualty Co. vs. Howard P. Foley Co., Inc.*, 158 Fed. (2d) 363, 364, and states that the Court was passing upon a provision of a lease as follows:

> "(2) Lessee hereby releases Lessor from any and all damages to both person and property and will hold the Lessor harmless from all such damages during the term of this lease."

This provision cannot be found in the opinion as the Court was, in fact, passing upon the following provision of an agreement:

> "Subcontractor shall save and hold harmless Contractor, Agent and Owner from and against all suits for claims that may be based upon any alleged injury (including death) to any person or damage to property that *may occur or that may be alleged to have occurred, in the course*

> *of the performance of this contract by Subcontractor*, whether such claim shall be made by an employee of a contractor or by a third person, and whether or not it shall be claimed that the alleged injury or damage was caused through a negligent act or omission of Subcontractor."

In the above case certain employees of subcontractor were injured on contractor's premises and recovered judgment therefor against the contractor, subcontractor and insurer. The only question determined by the Court was whether or not the injuries were sustained while the subcontractor was performing his contract. The Court held that they were not so sustained and denied indemnity to the contractor's insurer. No other question was decided.

Appellant at page 78 of his brief, cites the case of *Southern Railway Co. vs. Coca Cola Bottling Co.*, 145 Fed. (2d) 304, 307, wherein plaintiff railroad sought to recover as indemnitee certain damages paid by it to its employee. The last clause of the indemnity agreement provided:

> "* * * except that the Licensee (indemnitor) shall not be held responsible for any loss of life or personal injury, or damages to cars or property of the Railway Company, accruing from its own negligence, without fault of the Licensee, its servants or employees."

The Court held the injuries to the employee were the result of the indemnitee's own negligence and

were within the class expressly excepted in the last clause of the indemnity agreement.

Appellant at page 78 of his brief, cites the case of *Sinclair Prairie Oil Co. vs. Thornley* (10th Cir.) 127 Fed. (2d) 128, in which case an employee of an independent contractor was killed through negligence of the principal contractor. The Court was called upon to determine the legal effect of an agreement whereby the independent contractor agreed to carry Workmen's compensation and to assume responsibility for all such claims and to hold and save the principal free, clear and harmless therefrom. The Court said:

> "This is a provision generally found in such contracts, and the natural import thereof is that the contractor will so carry on his operations that no liability therefrom will attach to the other party."

and went on to hold that the indemnitor was not liable under the terms of the agreement, it not being clear that it had agreed to indemnify against the indemnitee's own negligence. Such is not the case here, for under no theory could the Lumber Company be charged with negligence which would defeat its right to indemnity.

Appellant at page 79 of his brief, cites the case of *Kay vs. Pennsylvania Railway Co.* 156 Ohio St. 503, 103 N.E. (2d) 751, which was an action for declaratory judgment as to whether an agreement executed by the purported indemnitor indemnified

the railroad for damages arising from maintenance of a drawbridge, on the theory of *ejusdem generis*. The Court held that no right to indemnity accrued for the reason that the subject-matter of the agreement (an unloading machine) was never constructed and the agreement was never operative.

Appellant at page 79 of his brief, cites the case of *Employer Liability Assurance Corp. vs. Post & McCord, Inc.*, 286 N.Y. 254, 36 N.E. (2d) 135, 139. In that case the Court of Appeals of N.Y. was called upon to construe a provision of a subcontract which provided that the contractor would indemnify the owner and manager against all claims, suits, damages and judgments to which the owner and/or managers may be subjected or suffer by reason of any injury to persons or property resulting from negligence or carelessness on the part of the contractor, its employees, or permitted subcontractors, in the performance of the agreement. The Court held that the contractor agreed only to respond for its own negligence—not the negligence of the indemnitee.

As we have seen, this question is not in issue in the present case.

Appellant also cites at page 79 of his brief, the case of *Halliburton Oil Well Cementing Co., et al vs. Paulk, et al.*, (C. A. 5th Cir.) 180 Fed. (2d) 79, 83, 84. In that case, the Court denied indemnity to a contractor for damages paid to an injured employee as the result of negligence of the contractor, stating that the terms of a work order to the effect that the contractor would not be responsible for damages or losses arising out of the work, could not be

construed as an agreement for indemnity against the acts of the indemnitee.

Again, we must conclude that none of the foregoing cases is in point in this appeal for under no theory can the Lumber Company be charged with negligence.

Appellant, at page 79 of his brief, relies upon the case of *Westinghouse Electric Elevator Co. vs. La-Salle Monroe Building Corp.*, 395 Ill. 429, 70 N.E. (2d) 604. In that case the injury complained of was solely the result of the indemnitee's negligence and the question was whether or not the indemnity contract could be construed as indemnifying one against his own negligence.

Quite properly the Court held that such a construction cannot be sustained in the absence of clear and explicit language in the contract.

At page 83 of his brief Appellant cites the case of *Burks vs. Aldridge*, 154 Kan. 730, 121 Pac. (2d) 276. This case was decided by the Supreme Court of Kansas under the Kansas Practice Act and not under Rule 14 which governs this case. In the *Burks* case the defendent was a contractor constructing a highway; he was sued for negligence and his insurance carrier was joined, and the Supreme Court of Kansas said:

> "As against the contractor the action was founded upon his alleged negligence. As against the appellant (Insurance Company) it was founded on the alleged contract of insurance. Ordinarily actions in tort and contract may not be joined."

The above rule is in force in many States because of the particular State statutes. This is true of the Idaho Practice Act, see:

> Section 5-606, Idaho Code;
> Stearns vs. Graves, 61 Idaho 232; 99 Pac. (2d) 955;

But the Rules of Civil Procedure are entirely different; for example, Rule II states:

> "There shall be one form of action to be known as a 'civil action'."

In a case decided by Judge Sullivan of the District Court for the Northern Division of Illinois, it is stated:

> "Objection is also made that the claim of liability on the part of the third party defendant arises on a contract which is separate and distinct from the cause of action forming the basis of plaintiff's suit."

The court, after quoting an authority, said:

> "This is the exact situation we have in the instant case. Counter claimants have set up by their counter claim a defense arising on a contract, while plaintiff's suit is on a negotiable instrument, but it should be borne in mind that in the federal courts we have but one form of action."

See:

United States vs. Pryor, 2 F.R.D. 382, at p. 387.

In another section of this brief we shall set forth the applicable equitable principles which are, that the economic loss should be finally visited upon the one whose negligence caused that loss, and we urge that in construing the indemnity agreement between the Lumber Company and Bedal these principles should also be kept in mind and that it should be the policy of the law that contracts should be so construed that right and justice shall prevail.

B. UNDER THE LAW OF IDAHO THE RULE AS TO IMPLIED INDEMNITY IS IN FULL FORCE AND EFFECT.

In an Idaho case in which an Express Company had placed its sign five feet ten inches above the sidewalk, and a passerby struck it and was injured, the general rule is stated by our Court:

> "While the city is liable in the first instance when it is negligent in such matters, the person or corporation that places such obstructions in or over the sidewalk or street is liable to the city for whatever damages it has to pay for such unlawful acts."
> Baillie vs. City of Wallace
>
> 24 Idaho 706, at p. 718, 135 Pac. 850.

C. THIS AND OTHER COURTS HAVE RECOGNIZED THE RULE OF IMPLIED INDEMNITY IN MANY CASES.

This Court in a recent case involving negligence by two parties, but where there was a direct active act of negligence on the part of one of the parties, this Court said:

> "The facts present the case fully within language used in the well known case of The Mars, D.C. S.D. N.Y. 1914, 9 Fd. (2d) 183, 184; 'It may be thought that this was a proper case for dividing damages. I think not. * * * I take it that the distinction there is this: Where two joint wrongdoers contribute simultaneously to any injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second.' The Restatement of Torts, Section 441, is to the same effect; '(2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable

of being made dangerous by the operation of some new force and in which the intervening forces makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence. While the third person's negligence, which sets the intervening force in active operation, is called active negligence.' "

United States vs. Rothschild International Stevedoring Co., (1950) 183 Fed. (2d) 181, at p. 182.

This entire matter was again exhaustively reviewed by this Court in the case of *Booth-Kelly Lumber Co. vs. Southern Pacific Co.*, 183 Fed. (2d) 902. In *Booth-Kelly* there was a written indemnity agreement, but it was necessary for this Court to review the rights and duties of the parties under the common law, and quotes at length from other cases where the Courts have held there is an implied indemnity agreement where two parties have been negligent, but one party was the direct cause of the injury; one quotation being on page 908 of 183 Fed. (2d) as follows:

"Of this class of cases is Washington Gaslight Co. vs. District of Columbia, 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712, in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages

were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely *malum prohibitum*, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury.' "

This Court then stated:

"In the Washington Gas Co. case, supra, the court explained the rule there enforced by quoting as follows: 'In the leading case of Lowell vs. Boston & Lowell Railroad, 23 Pick. (Mass.) 24, 32, (34 Am. Dec. 33), the doctrine was thus stated: 'Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendantis.*' If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint

offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers'." (161 U.S. 316, 16 S. Ct. 564, 569.)

Booth-Kelly Lumber Co. vs. Southern Pacific Co. (1950) 183 Fed. 2d. 902, at pp. 908-909.

Professor Moore states:

"The third party's duty to indemnify the plaintiff need not, however, be based on contract, but may arise by operation of law. Thus, where the case is one of primary and secondary liability, the party secondarily liable may implead the one primarily liable.

"For example, where A.B. sued C.D. for injuries claimed to have resulted from the breaking of a hook being used by C.D., C.D. was allowed to implead E.F., the manufacturer of the hook. The Third Circuit has held that under Pennsylvania law a steamship corporation sued by a seaman for maintenance, cure, and wages could bring in and assert a claim over for recovery against a third party whose alleged negligence caused the plaintiff's injury. A third party may be impleaded in a tort action when its liability

to the original defendant is based on a breach of an express or implied warranty. In an action against a railroad to recover damages for death caused by a collision, defendant may bring in the crew of the train that allegedly caused the accident."

Vol. 3, (2d) Ed., Moore's Federal Practice, Sec. 14.10, pages 424-425.

In an action against a charterer for the death of a stevedore, and stevedoring company was brought in as a third-party defendant, the Court said:

"Nor is discussion required concerning the failure to plead a written contract of indemnity. One cannot be sure whether the Eleventh paragraph of the third party complaint, above quoted, is intended to assert an oblique reference to a written contract for its benefit, or otherwise; but the cases to which reference has been made clearly establish that no written contract need be relied upon to support the claim to indemnity; the obligation is described as an implied contract arising from undertakings implicit in the relationships assumed."

Corrao vs. Watermann SS Corporation (1948) 75 Fed. Supp. 482, at p. 485.

This rule is also discussed in *Corpus Juris Secundum*, where the leading sentence is:

"The obligation to indemnify may result from implied contract or may be imposed by law.

> Where one is compelled to pay what another in justice ought to pay, the former may recover from the latter the sums so paid, as where one is compelled to pay for injuries resulting from his acts done under the direction of another."
>
> 42 C. J. S., Sec. 20, p. 594.

and also:

> "One compelled to pay damages on account of the negligent or tortious act of another has a right of action against the later for indemnity."
>
> 42 C. J. S., Sec. 21, p. 596.

One of the leading cases on this matter is that of:

Bradley vs. Rosenthal, 154 Cal. 420, 97 Pac. 875.

See, also:

Fenley vs. Revel, 170 Kan. 705, 228 Pac. (2d) 905;
Jentick vs. Pacific Gas & Electric, 105 Pac. (2d) 1005;
Gardner vs. Marshall, 145 Pac. (2d) 678.
See notes in:
38 A. L. R., 572,
66 A. L. R., 1148.

The *Restatement of the Law of Restitution*, Para. 94, page 413, states as follows:

> "A person who has become liable in tort to another because of an injury caused by his neg-

ligent failure to protect the other's person or property from the tortious conduct of a third person is entitled to indemnity from such third person for expenditures properly made in the discharge of such liability, if the payor could have recovered from the third person for an injury so caused to himself or to his own property."

Corpus Juris states:

"Where one is compelled to pay money which in justice another ought to pay, the former may recover from the latter the sums so paid."

31 C. J. Sec. 46, page 446.

It doesn't matter whether the original duty is based on a contract (here the indemnity agreement of the Lumber Company with the Railroads) or grows out of wrongful acts (torts). In a case where a transferee of bank stock did not pay an assessment and was sued by the transferor, who had to pay, on an implied indemnity agreement, the New York Court of Appeals said:

"Here the plaintiff asserts a right of action based on a contract implied in law for moneys which his assignor was compelled to pay though it was the duty primarily of the defendant to make the payment.

"The general rule which must be applied where such a right of action is asserted has been firmly established by an almost unbroken line of judicial decisions and by academic authority. 'A per-

son who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, ... ' American Law Institute, Restatement of the Law of Restitution, sec. 76. Where payment by one person is compelled, which another should have made or which redounds solely to the benefit of another, a contract to reimburse or indemnify is implied by law."

Brown vs. Rosenbaum, 287 N.Y. 510, 41 N.E. (2d) 77, 141 ALR 1345, at p. 1349.

It will be noted that the case of *Burris vs. American Chicle Co.*, 120 Fed. (2d) 218, was decided by the Second Circuit Court of Appeals on May 26, 1941. Since that time apparently there has been a change in the attitude of this Court. Following the *Burris* case a number of District Courts in the Circuit held in accordance with the rule that in a suit over, the defense that the original plaintiff could not recover against the defendant over was not valid.

"Rederii vs. Jarka Corp., D.C. Me., 26 F. Supp. 304; The ampico, D.C. N.Y., 45 F. Supp. 174; The S.S. Samovar, D.C. Cal., 72 F. Supp. 574, 588; Portel vs. United States, D.C. N.Y., 85 F. Supp. 458, 462; Contra: Johnson vs. United States, D.C. Or., 79 F. Supp. 448; Frusteri vs. United States, D.C. N.Y., 76 F. Supp. 667; Calvino vs. Pan-Atlantic S. S. Corp., D.C. N.Y., 29 F. Supp. 1022."

American Mutual Liability Ins. Co. vs. Matthews, 182 Fed. (2d) 322, at p. 324.
(Foot note No. 2)

Other cases hold likewise:

"The Tampico, D.C., 45, F. Supp. 174; Sever vs. U.S., D.C., 69 F. Supp. 21; Brosnan vs. American President Lines, 1943, A.M.C. 526; Landgraf vs. U.S., D.C., 75 F. Supp. 58, 1947 A.M.C. 1539; LoBue vs. U.S., D.C., 75 F. Supp. 154, 1948 A.M.C. 116, 119; Coal Operators Casualty Co. vs. U.S., D.C., 76 F. Supp. 681, 1948 A.M.C. 127."

Johnson vs. United States, 79 Fed. Supp. 448
(Foot Note No. 1)

In *The Tampico*, 45 F. Supp. 174, New York, decided April 8, 1942, where a stevedore employed by Nicholson Transit Company, owner of The Tampico, was injured while he was engaged in the hold of a barge from which a cargo was being transferred to The Tampico, and sued the barge company charging it was defective and dangerous. The owner of the Tampico was impleaded upon the petition of the barge owner claiming contribution on the ground of negligence of The Tampico owner.

Under the Jones Act the fellow-servant rule was not available to the owner of the steamship; the steamship owner was under the Longshoremen's Act and was immune from suit by its employee.

The Court said:

"Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 901 et seq., is immune from suits for damages resulting from libellant's injuries brought by the libellant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. Erie R.R. Co. vs. Erie Transportation Co., supra, 204 U.S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libellant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasors. Briggs vs. Day, D. C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. Sec. 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See Aktieselskabet cuzco vs. The Sucarseco et al, 294 U.S. 394, 400, 55 S. Ct. 567, 79 L. Ed. 942, and cases cited."

The Tampico, 45 Fed. Supp. 174, at pp. 175-176.

There are several State Court cases that should also be cited.

In *Kansas City & M. Ry. Co. vs. N.Y. Central H. R.R. Co.*, 163 S.W. 171 (Ark) the question arose be-

tween the initial carrier and the delivering carrier in connection with certain vinegar which was delivered by the delivering carrier without surrendering the bills of lading. The shipper, or consignor, recovered against the initial carrier, which, in turn, sued the delivering carrier through the act of which the loss occurred.

As a defense it was set up that the consignee was bankrupt; that the initial carrier had knowledge and refused to present its claim upon which he would have received a certain sum which should be offset; the Court held that the delivering carrier could have filed such a claim but the initial carrier could not, and, therefore, it was no defense.

The Supreme Court of the State of Washington held in the case of *Alaska Pac. S.S. Co. vs. Sperry Flour Co.*, 182 Pac. 634, that a judgment in an action by an injured servant against his master, and the owner of the premises on which the injury occurred, dismissing the action against the owner upon motion of the plaintiff, was not conclusive against the master in a subsequent action to recover from the owner the amount of the judgment against it. The Court held that the proceedings in the first action were conclusive as to certain facts, and said:

> "In view of the necessity of a new trial, we may say for the guidance of the trial court that we have examined into the error assigned upon instructions as to the force and effect of the judgment in the Egan case, and in view of the fact that appellant sought that dismissal voluntarily upon its own motion after the plain-

tiff's case had been presented to the jury, and after knowledge obtained from the pleadings of the fact that its codefendant claimed that it was responsible for the construction and maintenance of the plank approach, and notwithstanding the failure to at any time tender to it the defense of the action on behalf of the respondent, still the judgment was binding upon it in the four particulars named, i.e., it was proof that the plank approach was insecurely fastened, unsafe, and dangerous, that respondent was liable to Egan for the injuries received, that Egan was not guilty of contributory negligence, had not assumed the risk, and that no negligence of a fellow servant had intervened, and that Egan's damages were as shown by that judgment. Detroit vs. Grant, 135 Mich. 626, 98 N.W. 405; Chicago vs. Robbins, 2 Black. 418, 17 L. Ed. 298; Robbins vs. Chicago, 4 Wall. 657, 18 L. Ed. 427; Oceanic Steam Nav. Co. vs. Compania Transatlantic Espanola, 39 N. E. 360; Spokane vs. Crane Co., 98 Wash. 49, 167 Pac. 63; Bevan vs. Muir, 53 Wash. 54, 101 Pac. 485, 32 L.R.A. (N.S.) 588."

Alaska Pac. S.S. Co. vs. Sperry Flour Co., (Wash.), 182 Pac. 634, at p. 637.

The Circuit Court of Appeals for the Eighth Circuit on February 14, 1950, decided the case of *American District Telegraph Co. vs. Kittleson*, 179 Fed. (2d) 946. Kittleson was employed by Armour & Company; he was injured when an employee of the Tele-

graph Company fell through a skylight in the roof of the building where he was working; at the time the Telegraph Company was under contract to repair an automatic signal system in the building; the Telegraph Company filed a third-party complaint against Armour & Company; the third-party complaint was not for contribution but for indemnity and for judgment over against Armour, and the Court said:

> "The court stated the applicable Iowa law as follows 146 N.W. at page 854, quoting from Massachusetts cases: 'When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or particeps criminis, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in *pari delicto* as to each other, though as to third persons either may be held liable'."

American District Telegraph Co. vs. Kittleson 179 Fed. (2d) 946.

See, also:

United States vs. Rothschild, 183 Fed. (2d) 181 (9th CCA).

In the case of *Westchester Lighting Co. vs. Westchester Co.*, (N.Y.) 15 N.E. (2d) 567, an employee of the Defendant negligently broke a gaspipe maintained by the Lighting Company and negligently enclosed the fracture within a tile drain with the result that gas escaped into a nearby house and killed another employee of Defendant in the course of his employment at the time. The only negligence of the Plaintiff Lighting Company was the failure to make timely discovery that the gas was escaping. The deceased's administratrix obtained judgment against the Plaintiff Lighting Company which was paid and suit for indemnity was brought against the Defendant Westchester Company.

The defense was that the Defendant had secured compensation for its employees under the Workmen's Compensation Law and hence, had the suit been brought originally by the administratrix against the Westchester Co., no recovery could have been had. The Court held:

> "Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the Defendant."

The Court went on to say:

> "It is well established that a person guilty of negligence is liable not only to the person directly injured as a result of the negligent acts but is accountable to the person who is legally liable for the negligence and who has been compelled to respond to the injured person in damages. It

is not accurate to say that the basis of this liability is in contract. More aptly it may be said to be quasi-contractual. In Dunn vs. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439, this court said that '. . . . the wrongdoer stands in the relation of indemnitor to the person who has been held legally liable, and the right to indemnity rests upon the principle that every one is responsible for the consequences of his own wrong, and, if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former.' Page 217, 67 N.E., page 439.

"In Oceanic Steam Navigation Co., Limited vs. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987, 30 Am. St. Rep. 685, the court said: 'The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and, if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.' Page 468, 31 N.E. page 989. The rule is thus stated in the law of Quasi-Contracts by Woodward (259): 'But in some cases, as for example where the wrong consists of a mere unintentional neglect of duty, there can hardly be said to be an implication of a genuine promise of indemnity or contribution. In such cases, the obligation may well be rested upon quasi-contractual principles, for in so far as one tort feasor pays

> what in equity and good conscience another tort feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust'."
>
> Westchester Lighting Co. vs. Westchester Corp., (N.Y.) 15 N. E. 2d. 567.

In the case of *Aluminum Co. of America vs. Hully*, 200 F. (2d) 257, 8th Circuit, December 15, 1952, the Aluminum Company endeavored to offset an amount against the asbestos contractor, an amount which it had paid on account of injuries to an employee of the asbestos contractor. The employee was working on the Aluminum Company property, but at the time of injury he was not actually applying asbestos, but was moving out of reach of certain gases from a fluxing furnace.

The contract indemnified the Aluminum Company as to "personal injuries of employees of contractor arising out of or in any manner connected with the performance of this contract." The Court held:

> "The stipulated facts establish that the right and the only right or reason Barnes had to be in Alcoa's Remelt Building in proximity to its operations was to do his part in the performance of the contract. That is the purpose for which the contractor employed him there."

Then the question arose as to whether the employee was an invitee in the Aluminum Company factory. The Court held that had been adjudicated in the former action, saying:

"The adjudication in the Barnes case also settled against the contractor that Barnes was an invitee in the Alcoa factory at the time he was struck. He was an invitee on the premises solely by reason of his participation in the performance of the contract. It was adjudicated that his being where he was when he was struck was connected with the performance of the contract because he was acting to meet the emergency which confronted him while he was engaged in such performance. As the contractor had been given an opportunity to defend, the judgment in the Barnes action became conclusive upon the contractor as to facts determined therein which are essential to the judgment. Standard Oil Co. vs. Robbins Dry Dock & Repair Co., D.C. N.Y., 25 F. (2d) 339, affirmed 32 F. (2d) 182; B. Roth Tool Co. vs. New Amsterdam Casualty Co., 8 Cir., 161 F. 709; Citizens' Nat. Bank vs. City Nat. Bank, 111 Iowa 211, 82 N.W. 464; Hoskins vs. Hotel Randolph Co., 203 Iowa 1152, 211 N. W. 423, 65 A.L.R. 1125; 42 C.J.S., Indemnity, Sec. 32, pp. 613, 614. See also, Globe Indemnity Co. of New York vs. Banner Grain Co., 8 Cir., 90 F. (2d) 774; International Indemnity Co. vs. Steil, 8 Cir., 30 F. (2d) 654; Imperial Refining Co. vs. Kanotex Refining Co., 8 Cir., 29 F. (2d) 193."

In the case of *Barber S.S. Lines vs. Quinn Bros.*, 104 F. Supp. 78 (Mass.) February 29, 1952, the Court restated the rule as to implied indemnity as follows:

"Procedural distinctions aside, the substantive law as to implied contracts of indemnity is the same under the maritime law, the general federal law, the law of Massachusetts and the law of New York. The fundamental theory is that where a person has a non-delegable duty with respect to the condition of his premises or vessel but has made a contract with another to perform that duty, and the other performs it negligently so as to make the owner liable to a person later injured, then, as a matter of implied contract, the owner is entitled to restitution from the other for reasonable damages paid the injured person. Restatement, Restitution, Sec. 95; Geo. A. Fuller Co. vs. Otis Elevator Co., 245 U.S. 498, 38 S. Ct. 180, 62 L.Ed. 422 (law); Washington Gaslight Co. vs. Dist. of Columbia, 161 U.S. 316, 327-328, 16 S. Ct. 564, 40 L.Ed. 712 (law); Rich vs. United States, 2 Cir., 177 Fed. (2d) 688, 691 (admiralty) as explained in Slattery vs. Marra Bros., 2 Cir., 186 Fed. (2d) 134, 138; Burris vs. American Chicle Co., 2 Cir., 120 Fed. (2d) 218, 222 (law); Seaboard Stevedoring Corp. vs. Sagadahoc S.S. Co., 9 Cir., 32 Fed. (2d) 886 (law); The No. 34, 2 Cir., 25 Fed. (2d) 602, 604 (admiralty); Bethlehem Shipbuilding Corp., Ltd., vs. Joseph Gutradt Co., 9 Cir., 10 Fed. (2d) 769 (admiralty); Hollywood Barbecue Co., Inc. vs. Morse, 314 Mass. 232, 59 N.E. 657, 51 L.R.A. 781; Churchill vs. Holt, 127 Mass. 165; Westchester Lighting Co. vs. Westchester County Small Estates

Corp., 278 N.Y. 175, 15 N.E. (2d) 567; Oceanic Steamship Nav. Co. vs. Campania Transatlantica Espanola, 144 N.Y. 663, 39 N.E. 360; Cf. 45 Harv. L. Rev. 349, 351; Keener, Quasi-Contracts, p. 408."

In *Read vs. United States*, 201 Fed. (2d) 758, February 4, 1953, the following quotation is pertinent:

" 'The fundamental theory is that where a person has a non-delegable duty with respect to the condition of his premises or vessel but has made a contract with another to perform that duty, and the other performs it negligently so as to make the owner liable to a person later injured, then, as a matter of implied contract, the owner is entitled to restitution from the other for reasonable damages paid the injured person.' Barber S.S. Lines, Inc. vs. Quinn Bros., Inc., D.C.D. Mass. 1952, 104 Fed. Supp. 78, 80. See Restatement, Restitution, Sec. 96.

"Pioneer contracted to furnish adequate lights and did not, even after it was found there was only one light in the entire hold and that other lights belonging to the ship would not work, and for that breach alone of its contract, the United States is entitled to its judgment against Pioneer, independent of any express provision for indemnity in the contract. 'It is immaterial that there was no express provision for indemnity in the contract between these

parties.' Burris vs. American Chicle Co., 2 Cir., 1941, 120 Fed. (2d) 218, 222.

"The mere circumstance that the contract also contained an express provision for indemnity was not in any sense the dispositive factor in establishing the right of the United States against Pioneer arising out of the breach of its contractual duty—above described."

In *Palazzolo vs. Pan Atlantic S.S. Corp.*, 111 Fed. Supp. 505, April 7, 1953, a pertinent reference is as follows:

"Pan-Atlantic argues that liability has been visited upon it solely because of an improper stowage of cargo which made the ship unseaworthy and that since Ryan alone created the unseaworthiness which is 'essentially a species of liability without fault,' Seas Shipping Company vs. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 877, 90 L.Ed. 1099, this case comes within the rule of those cases which imply a contract of indemnity based upon the failure of a party to properly perform work which it contracted to do. See: Burris vs. American Chicle Co., 2 Cir., 120 Fed. (2d) 218; Rich vs. U.S., 2 Cir., 177 Fed. (2d) 688; Standard Oil Co. vs. Robbins Dry Dock & Repair Co., 2 Cir., 32 Fed. (2d) 182; Seaboard Stevedoring Corporation vs. Sagadahoc S.S. Co., 9 Cir., 32 Fed. (2d) 886; U.S. vs. Rothschild International Stevedoring Co., 9 Cir., 183 Fed. (2d) 181. In such

cases the employer's or indemnitor's negligence is described as being the 'sole,' 'active,' 'primary' or 'affirmative' cause of the employee's injury."

D. BEDAL'S SOLE AND ACTIVE NEGLIGENCE ADJUDICATED:

Counsel for Appellant appreciate that both this Court and the Supreme Court of the United States have held against their contentions; this accounts for their frantic attempt to distinguish and explain the decisions of this Court and the Supreme Court. Despite their semantics and sophistry, they are still confronted in the end with the fact that all acts and conduct upon which any liability could be based resulting in loss to the innocent party, Appellee, Hallack and Howard Lumber Company, were those of Appellant Bedal, and arose solely by his wrong doing.

First, counsel devote about one-third of their brief to the proposition that Bedal's negligence was not adjudicated in the Powell case because Bedal was not a party and had no opportunity to defend. As heretofore pointed out, there is no merit to such contention, because not only did Bedal know about Powell's claim, had notice of the suit, a copy of the complaint and was advised that he would be held responsible for any judgment—but he refused to defend. Having affirmatively admitted a refusal to defend the Powell suit, any additional notices or tender would have been vain and futile. Accordingly,

as pointed out by counsel in their brief (p. 47), he is no longer a stranger to that suit and he had the same 'means and advantages of controverting the claim as if he were the real and nominal party upon the recording.'

Then counsel state that Bedal's negligence was not adjudicated in the Powell suit, but that Bedal should have another chance to submit the matter to another jury—and upon the same evidence. It will be noted that Appellant offered nothing in addition to the testimony in the Powell suit. He only complains that he was not permitted to ask U. R. Armstrong certain questions (R. 34), which palpably were improper cross-examination, and the Court had a right to sustain objections to the same. Not only was no testimony introduced by Appellant, but he made no offer of proof. The transcript in the Powell case was offered by Appellees and admitted to show the facts and the scope of that which was adjudicated in the Powell suit. In addition, the testimony of certain witnesses that testified in the Powell suit was read into the record. The same trial Court had the same evidence before it in the Powell case. The question of Bedal's negligence had been before the Court once before. A jury had found such negligence. The Court specifically in the Powell case denied a motion for judgment notwithstanding the verdict upon the ground that Bedal was negligent—the sole and only active negligence—and that the railroads were liable even though the negligence was solely that of Bedal inasmuch as their duty was nondelegable.

The facts necessarily found in the Powell case necessarily determined the sole and active negligence of Bedal. The finding of Bedal's negligence was necessary to sustain the verdict. The only act complained of or involved was the act of Bedal. No separate or other act or violation of duty was claimed as to the railroads. In this case there was no cart which had been left for an undetermined time, nor a allegation of specific negligence that it was the duty of the railroads to warn the employee as in the case of Booth-Kelly Lumber Co. vs. Southern Pacific Co., supra. As a matter of fact, counsel argue in their brief that there was nothing in Bedal's operation to cause the railroads to warn any employee, because (there was no negligence and that) the same operation had been carried on in the same manner over a long period of time. Counsel affirmatively argue that there was nothing that the railroads could or should have done. Accordingly, as above mentioned, counsel are again driven back to the fact that the only possible basis of the Powell verdict was the conduct of Bedal.

Despite the fact that, as pointed out by the trial Court, Appellee, Hallack and Howard Lumber Company, is an innocent party, it is now required to pay the loss sustained as a result of such sole and exclusive conduct of Bedal. Counsel argue, however, that despite such situation, Bedal was not negligent, even though but for such negligence the verdict could not have been sustained against the railroads. Assuming that Bedal could re-litigate the verdict, counsel argue that there was no evidence of Bedal's negligence, "in

cutting the logs in the forest or negligent in the loading of them on the truck, or negligent in driving the truck to the place where they were dumped (Brief p. 56)." This is contrary to the record. In the first place, one of Bedal's agents and servants testified:

> "Q. Do you know whether or not in cutting the log in the forest, or cutting and trimming them after they had fallen, are they sometimes splintered?
>
> "A. I believe they are sometimes splintered. I think they (66) could have been in falling or in skidding."

In other words, Bedal knew that in his cutting operations the logs sometimes were splintered in falling or in skidding. There is no evidence that the railroads had any knowledge or should have known this fact.

Another one of Bedal's agents and servants testified as follows (R. 206):

> "Q. From your experience up there can you tell me, first, when these logs are cut and before they are hauled to the unloading dump, are some of them splintered sometimes?
>
> "A. Yes, I would say so.
>
> "Q. And did this slab indicate that it was splintered off a log that might have been cut in the forest?
>
> "A. I never questioned that part of it. I suppose it was, it could have been an unseen splinter there with the load.

"Q. Something that developed with the cutting of the logs?

"A. *Yes, I would say that it had occurred that way probably.* I know it could happen and it would happen lots of times, that there would be splintered logs.

"Q. Ordinarily the only thing that comes off those logs would be the bark?

"A. Bark and very small limbs.

"Q. And this was not a limb?

"A. No, it wasn't.

"Q. It was bark that had some timber on it?

"A. Yes, sir."

Bedal, through his agents and servants, knew or should have known that a splintered log should not be dumped over a steep bank where it would land with terrific force a considerable distance below with the foreseeable result that a piece of such splintered log might fly off and injure a third person. Inasmuch as counsel argue that no such splintered log had been dumped over the steep embankment at this particular location before, and no piece of such splintered log had ever been thrown off at this particular landing before, the railroads manifestly could not be charged with any duty resulting from any knowledge that such a negligent act would be performed by Bedal at the time and place involved.

It was for this reason that the trial Court held in the Powell case that the handling of the logs by Bedal was negligence, and which particular phase of the operation was negligent was a question for

the jury. It was the only question, because no separate act of negligence was alleged as to the railroads, and but for the negligence of Bedal, the verdict could not have been sustained.

It is, of course, axiomatic that under the Federal Employers' Liability Act, railroads are not insurers. The universal rule is specifically stated in 56 C.J.S. 945:

"A railroad company is not an insurer of the safety of its employees. * * * Fault or negligence may not be inferred from the mere existence of danger."

"Recovery cannot be had in the absence of negligence. Toledo St. L. & W. R. Co. vs. Allen, 72 L.Ed. pp. 513; Seaboard Air Line R. Co. vs. Horton, 233 U.S. 492, 502, 58 L.Ed. 1062, 1069, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann Cas. 1915B, 475, 8 N.C.C., A. 834."

Manifestly, cases involving separate acts of negligence by a railroad are not applicable. We have heretofore attempted to point out that where a railroad was negligent independent of the act of the independent contractor the adjudication is not necessarily determative of their respective liabilities. In the case at bar there was neither alleged nor shown, any act of negligence other than that of Bedal which was non-delegable as to Appellees.

We say Appellees, because even though Bedal was an independent contractor, the rule of non-delegable duty would be equally applicable to it. The rule is well stated by the Supreme Court of the United

States in Chicago vs. Robbins, 67 U.S. 418, 17 L. ed. 298. The trial Court was well aware of this rule and hence placed his ruling not only upon express indemnity, but implied indemnity as well. As heretofore pointed out, Appellee, Hallack and Howard Lumber Company was well aware of the possibility of such non-delegable duty, and hence protected itself by the express indemnity, which we have heretofore fully discussed. Although Appellant submitted the case at bar upon the same evidence as in the Powell case and failed to offer any proof whatsoever in explanation of any of Bedal's acts or conduct, he still insists that he should be free to re-litigate negligence in the case at bar. A jury having once found that his conduct was negligent, Appellant's only desire is to submit the same evidence to another jury. In view of his refusal to defend he admits that he is no longer a stranger to the Powell suit, but he is the same as if he were a real party to the action (R. 47). The situation is not dissimilar to that in the case of *Waylander-Peterson Co. vs. Great Northern Ry. Co.*, 201 Fed. (2d) 409, where the railroad's employee was working under a bridge where an independent contractor was working. The employee was found with a timber lying across his legs. The timbers were being installed by the contractor immediately above the tracks where the timber was found. As in the case here, the contractor was in exclusive control of the part of the bridge where the timber must have fallen. As in the case at bar, no explanation was offered as to how the timber struck the employee: The Court found:

"The jury could have found from the testimony that a timber similar to the one that struck plaintiff was on the bridge above the track where Lawrence was injured and that such timber would not have fallen unless it had been negligently left at a point where it would fall on a day when there was but little wind."

The Court then said:

"'* * * the accident itself affords reasonable evidence in the absence of explanation by the person in control that it arose from want of care."

As in the case at bar, the railroads' duty was nondelegable. However, the Court held that the railway company was not in control; the railway company did not create the situation. The only negligence that could be attributed to make the railway company liable arose out of the wrong-doing of the contractor. The Court said:

" '* * * The railway company had no control over the construction of this bridge or of the workmen who were employed thereon. The railway company was required to operate its trains under the bridge and to direct its trainmen to perform their duties in and about the bridge. The repeated instances of timbers and debris falling from the bridge, which rendered the railway company liable under the Federal Employers' Liability Act, was a condition which

> the railway company did not create. Its liability arose because of the non-delegable duty which rested upon it to exercise reasonable care to furnish Lawrence a safe place to work. Any negligence attributed to it so as to render it liable to Lawrence arose by the wrongdoing of those in charge of the construction of this bridge. The primary duty rested upon Waylander-Peterson Company to perform its work on the bridge as not to endanger the workmen who were required to work in proximity thereto. Its neglect was the primary, active cause of Lawrence's injuries. The railroad company's negligence, as between the parties, was secondary and passive'."

The same principle was applied in *Burris vs. American Chicle Co.*, supra. There was no evidence of any independent act of negligence on the part of the owner of the building. The only conduct upon which a verdict could possibly have been based against the building owner was the act or conduct of the window-cleaning contractor. The adjudication was sufficient to sustain liability over against the contractor.

Counsel argue that under the case of *Chicago vs. Robbins*, supra, Appellant had a right to *show* that the accident happened without his fault. In the first place, Appellant made no such showing and offered no proof. In the second place, the Robbins case is an illustration where separate acts of negligence were alleged, and the evidence was not necessarily

identical. In other words, it was alleged that there was actual notice and therefore a different duty than one implied by law. This was clearly distinguished by the Supreme Court of the United States in the case of *Washington Gaslight Co. vs. District of Columbia*, 161 U.S. 316, 16 S. Ct. 564, 40 L. ed. 712. The latter case is identical with the case at bar in that the findings in the first action were an essential pre-requisite to the judgment, and therefore could not be re-litigated in the second action. The Court said:

> "The verdict, therefore, against the District necessarily determined that the defect in the gas box had existed for such a length of time as to impute negligence to those whose duty it was to keep it in repair. The finding of this fact in the first action was an essential pre-requisite to a judgment against the District. The length of time required to imply knowledge and negligence on the part of the District is also sufficient in law to imply such knowledge and negligence on the part of the Gas Company. It follows, therefore, that the judgment against the District conclusively established a fact from which, as the duty to repair rested on the Gas Company, its negligence results."

In other words, "but for" the finding of certain facts, the judgment could not be sustained; so likewise, as hereinbefore pointed out, but for the acts and conduct of Bedal, the Powell judgment could not be sustained. These facts, therefore, are adjudicated and cannot be re-litigated.

Inasmuch as Bedal did not offer any additional proof, no explanation of why he was not negligent in controlling the premises and handling logs which resulted in injury to Powell, let us assume that such same record as was submitted to the jury in the Powell case had again been submitted by the Court to a jury in the case at bar, and the second jury upon the same facts would have found no negligence. Could the trial Court have done anything upon a motion for a judgment notwithstanding the verdict except to set it aside? This the Court clearly indicated in its memorandum opinion. In fact, the Court would have been compelled to grant such motion because the judgment in the Powell case as well as the evidence submitted conclusively established the sole negligence of Bedal.

It will be remembered that in the case of *Washington Gaslight Co. vs. District of Columbia*, supra, the trial Court admitted the transcript in the original case not only to determine the scope of the thing adjudged, but also as probative of the facts therein disclosed. The Supreme Court of the United States said that the latter was erroneous and the transcript could not be used to prove the facts as such. However, the Court very pointedly said:

> "The fact that it was admissible for the purpose of determining the scope of the thing adjudged in the suit in which it was given did not justify its being used for a distinct and illegal purpose. Error, however, in this particular was in no sense prejudicial if the judgment in the

first action conclusively established the negligence of the Gas Company."

For the trial Court to have done otherwise than grant such motion, would have permitted Bedal to escape the consequences of his own wrong-doing—his conduct which was the only conduct that resulted in the loss sustained. To have done otherwise, would have resulted in the innocent party, Appellee, Hallack and Howard Lumber Company, paying for the wrong committed by Bedal and would have done violence to the principle repeatedly annunciated not only by this Court but by the Supreme Court of the United States, that everyone is responsible for the consequences of his own wrong, and if another person has been held legally liable and compelled to pay the damages which the wrong-doer should have paid, the latter becomes liable to the former.

E. THE SCINTILLA OF EVIDENCE RULE DOES NOT OBTAIN IN THE FEDERAL COURTS.

On page 72 of his brief, Appellant states:

"The District Judge ignored the multitude of Idaho cases which construe a motion for a directed verdict against the party making the motion. Appellants need not spend time here discussing the well known principles of law surrounding the proper use of the directed verdict."

and then cites nine Idaho cases.

We believe it only necessary to point out that the Idaho cases cited by Appellant have no application here, as:

> "The state rules of practice have no application to the practice in federal courts with respect to the submission of jury issues, the direction of verdicts, or the sufficiency of the evidence to sustain a verdict upon a motion for directed verdict * * * ."
>
> Barron & Holtzhoff, Federal Practice & Procedure, Vol. 2, p. 755.

Under the Idaho practice a mere scintilla of evidence is sufficient to take a case to the jury. This is not true in the Federal Courts.

> Barron & Holtzhoff, Federal Practice & Procedure, Vol. 2, p. 758.

The above stated rule has been stated so many times that we hesitate to take any space to comment upon it and we merely cite the case of *Gunning vs. Cooley*, 281 U.S. 90; 74 L.Ed. 720. Likewise, it is a well-established rule that in any case where the record is in such a condition that if the trial Court would be compelled to set an adverse verdict aside it would be the duty of the trial Court to grant the motion for a directed verdict.

> Elliott vs. Chicago M. & ST. P. RR Co., 150 U.S. 245, 37 L.Ed. 1068.

F. SINCE BEDAL HAS ADMITTED THAT HE 'FAILED AND REFUSED' TO DEFEND THE POWELL CASE NO TENDER WAS NECESSARY.

Appellant, Bedal, admits that he not only knew about the suit of Powell against the railroads, but that he also received a copy of the complaint (R. 76).

The Supreme Court of the United States in the case of *Chicago vs. Robbins*, 67 U.S. 418, 17 Law Edition, 298, etc., said:

> "He is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it."

However, Appellant contends that in addition to such knowledge and receipt of the complaint, the defense should have been tendered to him. Even if this were necessary under Appellant's admissions, such tender would have been futile. Appellant admitted that he refused to defend such suit (R. 76).

The rule is briefly stated by *Williston On Contracts*, Vol. 6, page 5154:

> "So where the obligee has manifested to the obligor that tender, if made, will not be accepted the obligor is excused from making the tender."

In *Elliott On Contracts*, Vol. 3, page 128, the rule is laid down as follows:

> "It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not

necessary where it appears that if made it would have been vain and fruitless."

In *Restatement of the Law of Contracts*, Vol. 1, page 451, the law is stated:

> "No man is compelled to do a useless act, and if performance of a condition will not be followed by performance of the promise which is conditional, it is useless for the intended purpose and it is therefore unnecessary to perform the condition."

Many cases are cited in *17 C.J.S., page 986*, under the rule, "Non-tender is excused where it is apparent that a tender would be a vain and idle ceremony."

Typical cases in California and Washington are the following:

In *N. Pac. Sea Produce Co. vs. Nieder and Marcus*, 241 Pac. (Wash.) 682. Tender was excused, the Court saying:

> "They had repudiated the contract upon the theory that they were entitled to rescind, and their whole attitude in the case from beginning to end renders it plain that any tender would have been refused by them."

So likewise in the case of *Cowan vs. Tremble*, 296 Pac., (Cal.) 91, where the Court held that tender was unnecessary where the facts showed tender, would have been unavailing.

In other words, the rule is as old as it is universal that where the facts disclose that the tender would have been futile, it is no defense to contend that no tender was made. In the case at bar the futility is more apparent, because Appellant admits by his pleadings that he actually refused to defend.

We submit that the judgment secured by the Appellee Lumber Company against the Appellant should be affirmed.

Respectfully submitted,

OSCAR W. WORTHWINE
J. L. EBERLE
Attorneys for Appellee,
The Hallack and Howard
Lumber Company.

APPENDIX "A"

THE CASES CITED BY APPELLANT ARE NOT IN POINT.

In this Appendix we are distinguishing the cases cited by Appellant which have not been distinguished in the main brief.

We discuss the authorities in the order in which they appear in Appellant's opening brief.

On page 37 of his Brief Appellant cites the case of *In re Sharp*, 15 Idaho 120, 96 Pac. 563, which holds that a judgment can only bind the party thereto or the privies of parties to the action. This, of course, is sound law but has nothing to do with an indemnity agreement to hold a party harmless, and nothing to do with the liability under an implied indemnity agreement.

On page 37 of his Brief Appellant cites 30 *Am. Jur.*, Sec. 220. No page number is given and we assume Appellant intended to refer to Section 220 under the subject of 'Judgments'; if so, we have no quarrel with the general rules expressed therein.

On page 38 of his Brief Appellant refers to an article by Warren A. Seavey in Vol. 51, Harvard Law Review, page 100 (1943).

This is the wrong citation—*Vol. 51 Harvard Law Review* was published in 1937-1938.

After much search we found a note signed "W.A.S." in *Vol. 57, Harvard Law Review*, page 98, entitled

> "Res judicata with reference to persons neither parties nor privies—"

Two California cases were discussed, to-wit:

> Bernhard vs. Bank of America, 19 Cal. (2d) 807, 122 Pac. (2d) 892 (1942).

where it was held that the question of whether certain money had been a gift or had been embezzeled was *res judicata*, and that the defendant bank could claim the benefit of the former judgment although it was not a party nor a privy to any party to the prior proceeding.

Also:

> Perkins vs. Benguet Consolidated Mining Co., 55 Cal. App. (2d) 720, 132 Pac. (2d) 70.

and speaking of the above cases, the author states:

> "These two California cases are examples of the growing tendency of the Courts to hold that a defeated party should be precluded from setting up the same issue in a subsequent action

against a different opponent."

On page 39 of his Brief Appellant refers to Vol. 35 Yale Law Journal, p. 607 (1926). This is another general discussion with which we are not concerned here.

However, the author does discuss mutuality and privity and states that where a master has been found not negligent while acting through a servant, that a judgment against the plaintiff is conclusive,

as to the servant's negligence in a subsequent action brought by the same plaintiff against the servant.

On page 39 of his Brief Appellant cites the case of *American Surety Company of New York vs. Singer Sewing Machine Co.*, 18 Fed. Supp 750, 753. We call attention to the holding of the above case where it was held:

> "While the Singer Company was not a party to that suit, the facts there adjudicated against the surety company are conclusive against it when it seeks to compel the Singer Company to respond to the loss sustained in that suit."

On page 40 of his Brief Appellant quotes from the *Restatement of the Law of Judgments*, Sec. 107.

Appellant claims that the quoted statement does not apply in this case because Hallack and Howard was not a party to the prior suit (Powell vs. Railroads). We urge that this is not a distinction because Bedal was duly notified and given every opportunity to defend the Powell action and he has admitted that he "failed and refused" to do so.

On pages 41 and 42 of his Brief Appellant again quoted from the Restatement of the Law of Judgments, p. 513.

These statements as quoted by Appellant do not in any way support his position in this case because here it has been conclusively shown that Appellant had every opportunity to defend and "failed and refused" to do so.

In speaking of Tender, *Restatement of the Law of Judgments*, at p. 516, states:

"Such tender is not essential if the indemnitor indicates that he would not participate * * * On the other hand, if he is aware that the indemnitee intends to hold him if judgment is against the indemnitee and that indemnitee is unaware of the necessity of giving notice and a tender of control, the indemnitor will be estopped to set up the fact that he has not received notice of the action or a request to participate in the defense."

On page 44 of his Brief Appellant states that a principal is not liable for the negligent acts of an independent contractor, and in support of this doctrine, cites 27 *Am. Jur.*, p. 504, Sec. 27.

If this is true, why was the indemnity agreement placed in the Bedal-Hallack and Howard Contract (Ex. 8, R. 33, 35)? Why did they provide that Bedal was to take out public liability and property damage insurance and "specifically name and protect said first party in case of possible accident involving persons or property not connected with or owned by the parties to this contract"?

On page 46 of his Brief Appellant cites the case of *Washington Gaslight Company vs. District of Columbia*, 161 U.S. 316, 40 L.Ed. 712. This case needs no further comment here.

On page 47 of his Brief Appellant cites *Restatement of the Law of Restitution*, Sec. 94, p. 413.

We have read the above authority and it does not support Appellant's position in the slightest degree.

Section 238 of 30 Am. Juris., p. 970, is cited by Appellant on page 48 of his Brief, but see the following:

> "A mere notice with no offer to surrender the defense of an action has been held insufficient. However, there are also cases in which it is held that a judgment is conclusive against a person liable over where he is notified of the defense of the original action, although he is not requested to take charge of the litigation or notified that if he fails to do so he will be held responsible."
>
> 30 Am. Juris., Sec. 241, p. 972 (judgments).

Note cites:

> Drennan vs. Bunn, 124 Ill. 175, 16 N.E. 100, 7 Am. St. Rep. 354.

United States Fidelity & Guaranty Co. vs. Dawson Produce Co., 68 Pac. (2d) 105 (Okla.) cited by Appellant on page 48 of his Brief. Oklahoma had a workmen's compensation act which covered only some employees and only some injuries.

The Dawson Produce Company took out a policy with the United States Fidelity & Guaranty Company insuring it against injuries to employees.

When the injured employee sued Dawson it pleaded he was covered by workmen's compensation which was a bar. It also gave notice and an opportunity to defend. The employee recovered and then

Dawson sued the Insurance Company, and the Court held:

> "Singhrs (employee) did not in his petition seek to have the business relation thus described classified as one of employment and such a classification thereof was not essential to his cause of action.
>
> "The finding of the court in the former action that he was an employee was therefore not responsive to any issue tendered by the plaintiff's petition in that action.
>
> "* * * The general judgment in favor of Singhrs in the prior action amounted to a denial of this contention and a negative finding thereon." i.e., that he was an employee.

Inashima vs. Wardall, 224 Pac. 379, 128 Wash. 617, cited by Appellant on page 48 of his Brief, was a case where the mortgagee tried to follow mortgaged car which had been sold. The mortgage showed the name 'George Kioke' in several places; signature illegible; real name was 'George Koike.' This case merely holds the County Recorder had pleaded a good defense and judgment in original foreclosure action not conclusive, and the Court held:

> "It was enough in that suit (original) for the purchaser to show that at the time of his purchase he had no actual notice of the existence of the mortgage, and that the records did not afford constructive notice to him. Whose fault it was that the records were thus defective

> in no way concerned him. He could recover whether the fault lay with the mortgagee or with the auditor, and any dispute between these persons had no place in the suit he was litigating."

NOTE: In the above case, the question concerning notice involved service on the agent of the surety instead of statutory agent.

The case of *Southwestern Railway Co. vs. Acme Fast Freight,* (Georgia) 19 S.E. (2d) 286, cited by Appellant on page 48 of his Brief, was an action under a statute of Georgia relative to vouching in. It involved the loss of a shipment of goods; in the final action against Southwestern Railway it was stipulated by counsel that:

> "the pilferage of the carton occurred in New York City and before the shipment was transferred by the Pennsylvania Railroad to the Southern Railway Company (which took place at Baltimore, Maryland)."

The Court decided one single question under the Georgia Code, and then said:

> "Despite the rule we have indicated, it may, however, well be conceived that the vouchee under the particular facts of a case may also be precluded by the original suit as to the additional question of his own liability over to his voucher. This would seem true in a case where, upon being vouched into court, his response as

made by his own pleading or his actual procedure in his conduct of the case necessarily establishes his own liability over to the original defendant for any recovery which might be had against that defendant."

Appellant, at page 48 of his Brief, cites the case of *City of Lewiston vs. Isaman,* 19 Idaho 653, 115 Pac. 494.

We consider this case directly in point in support of our position here. In that case the McLean's had recovered a judgment against the City of Lewiston because of personal injuries received by reason of defective doors placed in the sidewalk in front of Isaman's business building. The evidence showed that at the time of the accident Isaman had leased the building to a third party and it was the duty of the tenant to keep the building and premises in repair. Isaman demanded of the City Attorney that he be permitted to appear in the main case and defend it, and the City of Lewiston refused to permit his intervention in the lawsuit charging that Isaman was in no way interested in the lawsuit and was probably not liable.

However, as is generally known, the City of Lewiston was operating under a City Charter which authorized it to provide sidewalks and gutters and to regulate cellar-ways and cellar lights and sidewalks, and then provided:

"The city of Lewiston shall be liable to anyone for any loss or injury to person or property

> growing out of any casualty, or accident happening to any such person or property on account of the condition of any street or public ground therein; but this section does not exonerate any officer of such city, or any other person from such liability when such casualty, or accident is caused by the wilful neglect of a duty enjoined upon such officer or person by law, or by gross negligence, or wilful misconduct of such officer, or person in any other respect."

The above quoted Section was the basis for the Supreme Court's decision, and the Supreme Court of Idaho proceeded to distinguish the case of *Washington Gaslight Co. vs. District of Columbia*, 161 U.S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, and stated:

> "There are no such facts in the case at bar. The charter of the city of Lewiston provides that if casualty or accident is caused by the wilful neglect of a duty enjoined by law or by gross negligence or wilful misconduct, then the person is liable; otherwise, not."

and finally the Supreme Court of Idaho said:

> "There are at least two reasons why the judgment in this case must be reversed; First, defendant is not liable on the facts of this case under the provisions of said section 93 of the charter of the city of Lewiston which makes the city liable for any loss or injury to person or property growing out of any casualty or ac-

cident happening to any person or property on account of the condition of any street or public ground therein, and only makes the property owner liable when such casualty or accident is caused by wilful neglect of a duty enjoined by law or by gross negligence or wilful misconduct on the part of such person, and it is not made to appear from the evidence that the defendant is guilty of any acts which would bring him within the provisions of said section 93; and second, even if there were any liability under the charter, it would not fall on appellant as he had leased the entire premises and tenants had possession thereof."

City of Lewiston vs. Isaman, 19 Idaho 653, at pp. 673-674, 115 Pac. 494.

So under the *City of Lewiston* case the Supreme Court of Idaho did not pass upon a state of facts in any way similar to the facts in the case at bar, and that case is not authority to the effect that generally a recovery over can not be had.

The true Idaho rule is stated in the case of *Baille vs. City of Wallace* (1913) 24 Idaho 706, 135 Pac. 850, where it appeared that an Express Company had placed a sign over the street, and a judgment was had against the City, and our Supreme Court said:

"While the city is liable in the first instance when it is negligent in such matters, the person or corporation that places such obstructions in

> or over the sidewalk or street is liable to the city for whatever damages it has to pay for such unlawful acts."

Appellant cites the case of *Seattle vs. Northern Pacific Railroad Company* (Wash.) 92 Pac. 411, on page 48 of his Brief.

The facts set forth in that case are entirely different from the case at bar; in that case a small boy, while on the property of the Northern Pacific Railway Company, suffered a severe injury and brought an action against the Northern Pacific Railway Company to recover therefor, and in that case a judgment was entered in favor of the Northern Pacific Railway Company. Later, the injured boy instituted an action against the City of Seattle and recovered a judgment against the City of Seattle.

Then the City of Seattle sued the Northern Pacific Railway Company, and it appears from the facts in that case, that after the action had been commenced by the boy against the City of Seattle the Railway Company notified the City of Seattle and requested the City to plead the former judgment in favor of the Railway Company, and the City refused to do so, and on that ground the Court held the City could not recover from the Railway Company.

Appellant also cites the case of *Burchett vs. Blackburne,* (Ky.) 248 S.W. 853, at p. 49 of his Brief.

In that case it appeared that a grantor had conveyed property with a warranty of quiet and peaceable possession. A third party had instituted an

action claiming that he owned the property conveyed. The grantee failed to give the warrantor notice of the pendency of the action, and since the warrantee had not been dispossessed, the Court held he could not recover against the warrantor, but the Court did hold that if notice had been given that the judgment in the former case would be res judicata against the warrantor.

Appellant, at page 49 of his Brief, cites the case of *Crawford vs. Pope and Talbot Inc.*, et al., 206 Fed. (2d) 784 (3rd Cir., 1953). In this case Crawford and Lucibello sued Pope and Talbot, Inc. and General Engineering Works for personal injuries; they suffered the injuries while working on a ship called the 'Jones' which was under charter to Pope and Talbot, Inc. The defendants pleaded no negligence and contributory negligence. The General Engineering Works, a welding company was employed by Pope and Talbot to repair the vessel tanks, and during the course of the trial the actions were dismissed as to the General Engineering Works and no appeal was taken from the order of dismissal.

The Defendants filed a petition to bring into the action Cecelia O. Jeffries, individually and trading as the National Boiler Cleaning Company; the motion bringing in Jeffries was granted but this petition was later dismissed on the ground that the libellants or plaintiffs were her employees, and subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and therefore could not sue her.

It was found that there was no contributory negligence and that the original defendants, Pope and Talbot, were negligent.

The Court held first that the Longshoremen's Act prevented the plaintiffs from suing their employer, and that therefore Pope and Talbot were not entitled to contribution. The Court specifically held, however, that the Act:

> "does not insulate the employer from all liability to a third party from whom an employee has recovered damages. See United States vs. Arrow Stevedoring Co., 9 Cir., 1949, 175 Fed. (2d) 329, 332. Liability for indemnity as distinguished from contribution, may arise from the contractual relations of the employer with the third party. Claims for full indemnity arising out of such contractual relations have *not* been considered barred by the section. See Rich vs. United States, 2 Cir., 1949, 177 Fed. (2d) 688. The right to indemnity can, of course, arise by virtue of an express contract or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case the indemnitee has a claim which is independent of and does not derive from the injury to the employee, except in a remote sense not within the provisions of Section 5. Compare Hitaffer vs. Argonne, 1950, 87 U. S. App. D. C. 57, 183 Fed. (2d) 811, 819-820, 23 A.L.R. (2d) 1366. We conclude that Pope and Talbot should

have been permitted to implead National on its claim for indemnity insofar as Section 5 is concerned."

and the Court cites the following:

Westchester Lighting Co. vs. Westchester County Small Estates Corp., 1938, 278 N.Y. 175, 15 N.E. (2d) 567;
Burris vs. American Chicle Co., 2 Cir., 1941 120 Fed. (2d) 218.

and then the Court said:

"It follows that Pope and Talbot is not entitled to contribution from National but may be entitled to indemnity."

The Court then, after reviewing various authorities regarding the judgment in the original action being final, said:

"Where, on the other hand, the indemnitee and the indemnitor are co-defendants actively participating in the defense of the original action, or where the indemnitor, with notice of the action and of the indemnitee's request that he defend it, does not participate in the defense but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them both indemnitor and indemnitee are bound by the findings necessary to the judgment in the action."

and the Court then held that since National had been dismissed by order of the Court that the prior judgment was not conclusive.

> Crawford vs. Pope & Talbot, Inc., et al, 206 Fed. (2d) 784.

Appellant, at page 53 of his Brief, cites the case of *Robb vs. Security Trust Company*, 121 Fed. 460 (3rd Cir.).

This case is not at all similar to the case here. In the above case the indemnitee failed and refused to cooperate in the taking of an appeal in which, if it had been taken, there would have been a reversal of the first judgment.

All that the *Robb* case holds is that when an indemnitor takes charge of litigation on behalf of the indemnitee he should be allowed to take an appeal.

Appellant, in his Brief at page 54, cites the case of *Cofax Corporation vs. Minnesota Mining & Manufacturing Co.*, 79 Fed. Supp 842 (S.D.N.Y.) 1947. This case involved patent infringements. The original actions had been against independent selling agents; all that this case holds is that one of the companies

> "was not the instrumentality, agency or subsidiary of The Cofax Corporation in the State of Illinois."

Here, the defendant had prevailed in infringement suits in Illinois against the distributors of Cofax tape; Cofax had entered into a contract to defend

Freydberg Brothers against infringement suits. Plaintiff in the present action had refused to defend Freydberg. However, Minneosta Mining & Manufacturing Company set these facts up as res judicata.

It will be noted that Cofax was suing Minnesota for infringement; Freydberg, the original indemnitee, was not in any way involved in the Cofax case against Minneosta Mining & Manufacturing Company; while, in the case at bar, the indemnitee, The Lumber Company, is suing the indemnitor, W. O. Bedal.

Appellant, in his Brief, at page 54, quotes, in part, from 42 *Corpus Juris Secundum*, Sec. 32, page 617-618, Comment (c) (Indemnity). Appellant significantly does not quote the entire paragraph and leaves out the very important statement:

> *"but he is precluded from making a defense which he could have made in the first action."*

Here, Bedal had every opportunity to participate in the first action but he 'failed and refused' to do so.

As a foot note on page 54 of his Brief, Appellant quotes from Section 96 (2), *Restatement of the Law, Judgments*, but on page 482 of that work, it is stated:

> "This is to be contrasted with the rule stated in Section 107, to the effect that in the subsequent action by the indemnitee against the indemnitor, a valid judgment rendered under such circumstances is conclusive."

In ruling on the motion made in the Powell case for judgment notwithstanding the verdict, the Court said:

> "Defendant's motion for Judgment Notwithstanding the Verdict having heretofore been presented to the Court on oral argument of counsel for the respective parties and the matter having been taken under advisement by the Court and the Court having carefully reviewed the evidence submitted at the trial in order to determine whether the evidence of negligence was sufficient to justify the Court in submitting the case to the jury, finds: according to the testimony the plaintiff was struck by a slab from a log being unloaded from a truck on a road some twenty feet above the location of the bunkers where the logs were loaded on the train. A 'Cat' and Boom was used, a line placed underneath the logs and they were pushed off the truck and would fall down a steep incline unrestrained a distance of about twenty feet. Where they were pushed from the truck the incline was so steep that they fell through the air a distance of about twelve feet before they hit the ground and then rolled on the balance of the distance to the Bunker. The Slab that caused the injury to the plaintiff broke off one of those logs and was thrown through the air and, no doubt, was caused to break from the log because of the force of the drop.
>
> "Whether the operation in driving the trucks to the top of this steep embankment, pushing the

logs from the truck and allowing them to descend this steep incline to the track was negligence was a question for the jury.

"If there is a reasonable basis in the record for concluding that there was negligence of the employer which caused the injury it would be an invasion of the jury's function by this Court to draw a contrary inference or to conclude that a different conclusion would be more reasonable. (Ellis vs. Union Pacific Railroad Company, 329 U. S. 649.)

"The motion will be denied, and it is so Ordered." (R. 141-142)

A request for admission was served on Bedal (R. 155), and Bedal admitted:

"That the injuries to the said A. M. Powell at Banks, Idaho, on the 15th day of September, 1949, were caused by a piece of timber which broke off one of the logs being unloaded on or onto the leased premises." (R. 155-156)

Bedal also admitted:

"Admits that W. O. Bedal, his agents, servants and employees were unloading logs onto or toward the premises covered by Exhibit 'A' attached to the complaint, and near the place where A. M. Powell was injured; admits that the unloading of said logs was for the use and benefit of Hallack and Howard Lumber Company—all pursuant to the contract which is attached to Third-Party complaint;" (R. 159)

Appellant, in his Brief at page 65, cites the case of *Taylor vs. J. A. Jones Construction Co.*, (N.C.) (1928) 141 S.E. 492. In this case the building contractor and subcontractor were both negligent and contributed to injury and were both joint tort-feasors. The Court discusses the general equitable rule, saying:

> "The general rule is that there can be no indemnity or contribution between joint tort-feasors.
>
> "It is also familiar learning that there are certain well-recognized exceptions to general rules and that in proper cases indemnity or contribution is allowed, but such recoveries rest solely and entirely upon established principles of equity."

The Court then quotes from an Illinois case as follows:

> " 'Where one of them is only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both equally liable to the injured person. * * * The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principle delinquent, and the law will inquire into the real delin-

quency and place the ultimate liability upon him whose fault was the primary cause of the injury.' "

Appellant, at page 65 of his Brief, cites the case of *Massachusetts Bonding & Insurance Co. vs. Dingle-Clark*, 52 N.E. (2d) 340, 142, Ohio St. 346. In this case, the judgment in the former action was conclusive that the Steel Company had been actively negligent in failing to light a sump in a building. This was an ordinary case of joint tort-feasors, each contributing directly to the injury.

Appellant, at page 66 of his Brief, cites the case of *Atlanta Consolidated Street Ry. Co. vs. Southern Bell Tel. & Tel. Co.* (Cir. Ct. ND Ga.), 107 Fed. 874.

This case was decided in 1901 and it was held that the Street Railway Company was the active tort-feasor and could not recover from the Telephone Company.

The case of *Stabile vs. Vitullo*, 112 N.Y.S. (2d) 693, cited by Appellant at page 67 of his brief, involved a public hall broken stairway, and the Court said:

> "The third-party plaintiffs may not have a recovery over for a loss which they could have averted by the exercise of reasonable care.
>
> "In that case the owner had actual notice of the defect for a long time, and was in *pari delecto* with third party defendant."

See, also:

Ruping vs. Great A & P Co., 126 N.Y.S. (2d) 687.

The case of *Spaulding vs. Parry Navigation Co.*, (U.S. D.C. S.D. N.Y.) 90 Fed. Supp 564, cited by Appellant in his Brief at page 67, supports our position. See the quotation from *Moore* at page 565 of 90 Fed. Supp.

Falk vs. Crystal Hall, Inc., 105 N.Y. Supp. 2066, cited by Appellant in his Brief at page 68. The correct citation is "105 N.Y. Supp. (2d) 66."

The result obtained in that case was based on facts quite similar in nature to those in Stabile vs. Vitullo, supra, and are not otherwise involved in the present case.

Appellant, at page 69 of his Brief, cites the case of *Standard Accident Insurance Co. vs. Sanco Piece Dye Works*, 64 N.Y.S. (2d) 585.

In the above case the landlord was held to be a joint tort-feasor and hence could not recover either indemnity or contribution.

No. 14,197

IN THE

United States Court of Appeals

For the Ninth Circuit

W. O. BEDAL,
Appellant,

vs.

THE HALLACK AND HOWARD LUMBER COMPANY, a corporation,
Appellee;

and

W. O. BEDAL,
Appellant,

vs.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellees.

Appeals from the United States District Court for the District of Idaho.

REPLY BRIEF FOR APPELLANT.

ELAM AND BURKE,
By LAUREL E. ELAM,
CARL A. BURKE,
CARL P. BURKE,
FRED M. TAYLOR,
P. O. Box 2147, Boise, Idaho,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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REPLY BRIEF FOR APPELLANT.

SUMMARY OF ARGUMENT.

A. There is no evidence presented in either the Powell case or in the cases appealed from that creates an inference that Bedal was negligent.

B. Assuming Bedal was bound by the facts adjudicated in the Powell case, the question of whether Bedal was or was not negligent was not adjudicated by the court and jury.

1. Bedal cannot be bound to any set of facts not adjudicated in the Powell case.

C. Bedal was never asked to defend the Powell case by the railroads nor given notice to defend by them and, therefore, could not be bound by any set of facts that might have been found to exist by the trial court.

1. The lumber company could not bind Bedal to any finding that might have been made in the Powell case, because it was a stranger to that lawsuit and could not make and did not make a proper tender of defense nor afford Bedal an opportunity to participate in that litigation.

D. Since there was no evidence of Bedal's negligence in either of the two trials, Bedal is entitled to a directed verdict.

E. The railroads were found guilty of negligence and since they acquiesced in the manner in which the logs were unloaded and still allowed their employees to be near the unloading site, they are primary tort feasors.

1. A joint-tort feasor is not entitled to indemnity and the lumber company stands in the railroads' shoes as a subrogee.

F. The issue of Bedal's negligence, if any; Powell's contributory negligence; which negligence was primary or secondary, and whether the railroad acquiesced in a dangerous condition or not were questions that Bedal was entitled to have passed upon by a jury.

G. The logging contract entered into by Bedal and the lumber company can in no sense be construed as an indemnity agreement.

ARGUMENT.

A. THERE IS NO EVIDENCE IN EITHER THE POWELL CASE OR IN THE CASES APPEALED FROM THAT INDICATES BEDAL WAS NEGLIGENT.

We sincerely urge that an examination of the transcript in this case, together with an examination of the transcript in the Powell case, will disclose no evidence from which an inference can be drawn that Bedal was negligent. For the purposes of this argument, we are assuming that Bedal is bound by any facts that may have been litigated in the Powell case and bound by any inference that may be gleaned from those facts. We argue later that Bedal is not bound by the adjudication of the trial jury in the earlier case.

The court should note that in the appellees' brief repeated assertions are made that Bedal was the ultimate wrongdoer; that Bedal was negligent; and that his negligence was adjudicated to be active negligence. The Hallack and Howard Lumber Company is con-

stantly referred to as an innocent party. In fact, of course, the Hallack and Howard Lumber Company by an express contract arrangement agreed to indemnify the railroad against its own—the railroad's—negligence. Is the lumber company then indeed an innocent party? The fact of the matter is that in this lawsuit it is Bedal that has been and is the innocent party caught in the web of circumstances. While these references are being made in appellees' brief to Bedal's negligence, there is seldom any examination of the record or the transcript. The reason appellees do not examine the state of facts shown in either the Powell case or in the cases appealed from is that such an examination discloses no negligence. It is simple enough to allege and reallege throughout an entire brief that the appellant is negligent, but it is another thing to prove it.

The undisputed evidence in the Powell case shows that Powell was hit by a slab from a log which broke off as logs were being unloaded from Bedal's logging truck in the customary and usual manner. (R. 232.) The logs had been pushed down the same 20-foot incline for years prior to the accident. The slab itself came from an unseen splinter in a log. The evidence also indicates, and this is not disputed, that Powell was not watching the unloading operations at the time the accident occurred. Each witness that testified stated unequivocally when he was so asked that the logs were being unloaded in the usual way and there was nothing unusual in any of Bedal's operations. As

a matter of fact, Powell was standing off the leased premises at the time he was hit by the slab and was sitting on the railroad right of way. There is no evidence that Bedal had any control over Powell's movements, or could tell Powell where to be, or any evidence that Powell was known to be where he was by any of Bedal's employees who were in the process of unloading the logs from the truck. Nowhere in the record in any of the cases is there any evidence of negligence or lack of ordinary care. There is no evidence that the splinter was clearly visible and should have been seen by Bedal or his employees. In fact, as it is pointed out on page 59 of appellees' brief, the splinter was probably "unseen". (See R. 206.) There is no evidence that Bedal would expect this slab to fly off the log. The evidence shows and this is agreed to by the appellees in their brief that such a slab had never fallen off any log before to the knowledge of any employees present or to the witnesses testifying.

How different the facts are in this case from the facts showing negligence in the cases cited by appellees on page 36 of their brief et seq. While we will discuss this question of implied indemnity later on, suffice it to say at this point that in each of the cases in which the courts have applied the principle of indemnity over, the person ultimately responsible is one who without doubt has been negligent and his negligence was the primary cause of an accident or injury. In *United States v. Rothchild International Stevedoring Co.* (1950), 183 Fed.2d 181, cited in appellees' brief

on page 37, the Stevedoring Co. was responsible for the accident because it was operating a winch that had defective brakes. In fact, the evidence disclosed that the brakes had slipped approximately twelve times before the accident in which the original plaintiff was injured. In *Burris v. American Chicle Co.,* 120 Fed. 2d 218, cited on pages 63 and 64 of appellees' brief, the party against whom indemnity was sought was responsible for placing an employee on a scaffold suspended in the air and held up by ropes, one of which was clearly defective. In *Read v. United States,* 201 Fed.2d 758, the third party defendant was held liable because it failed to provide adequate light. (See page 54 of appellees' brief.) In the case of *Westchester Lighting Co. v. Westchester County, etc. Co.* (N.Y.), 15 N.E. 2d 567, the Court properly held that the employer who caused a gas pipe to be negligently broken and enclosed was primarily responsible. Furthermore, in *Alaska Pac. S.S. Co. v. Sperry Flour Co.,* 182 Pac. 634, cited on page 46 of appellees' brief, the party against whom indemnity was sought was probably responsible for a defective plank that was attached between the shore and a boat at dock. We state it was "probably" a defective plank because in that case the Washington Supreme Court reversed the decision of the lower court and ordered that a new trial be held. The basis for the new trial was, as pointed out on pages 636 and 637 of the Pacific Reports, that the appellant was entitled to have the jury determine whether or not the plaintiff steamship company had acquiesced in the dangerous condition cre-

ated by the plank and was precluded from recovery over.

In each of the cases cited by the appellees on page 36 of their brief et seq. there is clear evidence that the party ultimately responsible was guilty of active negligence. What a contrast there is to the factual situation now in front of this court. Nowhere can there be gleaned even an inference of negligence against Bedal.

On page 56 of appellees' brief, there is a feeble attempt to show that there was evidence in the case sufficient to indicate that Bedal was negligent. In looking into the record and trying to find such evidence the appellees depart from what the trial court originally indicated may have been Bedal's negligence. In the Powell case, the court, in denying the railroads' motion for a judgment notwithstanding the verdict (R. 136-140), stated among other things in substance that whether the operation of driving the truck to the top of the steep embankment, pushing the logs from the truck to the top of the steep embankment, and allowing them to descend this steep incline to the track was negligence was a question for the jury. In this statement, of course, the trial court was wrong. There is no evidence that allowing logs to descend a steep bank was negligence. The only thing submitted to the jury was whether, considering the fact that logs did go down an incline, the railroad nevertheless did not provide sufficient protection to its own employee Powell who was sitting on the railroads' premises.

That this statement of the court cannot be relied upon is clearly shown by appellees' own argument, where on page 59 of their brief they feel that the negligence of Bedal must have been that it knew there was a splintered log and, therefore, it should not have allowed this splintered log to go down this steep bank. (See page 60 of appellees' brief.) Of course, there is no evidence whatsoever that Bedal or his employees knew that there was a splinter in the log or that they should have known that. There is no evidence as to how the logs were cut or felled in the forest or what Bedal or his employees could have done that they did not do. The only positive evidence on this point is that the splinter was probably "unseen" in the log. How could Bedal or his employees have protected anybody or anyone from an "unseen" splinter? Undoubtedly, the speculation that each of the witnesses entered into concerning where the slab came from is correct, and that is that the slab came from an unseen splinter. Is this fact, standing alone, sufficient in itself to establish a case of negligence? Appellant fervently urges the court that the mere fact of an accident is not evidence that Bedal was negligent. Therefore, we sincerely urge the court to reverse the decision of the lower court and direct a verdict in favor of Bedal.

B. THE QUESTION OF WHETHER BEDAL WAS OR WAS NOT NEGLIGENT WAS NOT SUBMITTED TO THE JURY IN THE POWELL CASE.

The appellees have stated several times that the jury found in the Powell case that Bedal was negligent. On page 58 of their brief the appellees speculate upon what basis the Powell verdict could have been sustained. They argue that the railroads were in no way negligent and, therefore, the only possible basis for the court to sustain the verdict was to find that Bedal was negligent. In one respect, of course, we will have to agree with counsel for the lumber company. The evidence in the whole case hardly sustains an inference that even the railroads were negligent. Nevertheless, the jury found for the plaintiff and the trial court did everything it could to sustain the verdict for the plaintiff Powell. In reading over the appellees' brief, one must reach the inescapable conclusion that appellees cannot satisfy themselves as to how or why Powell recovered a verdict on the basis of negligence.

In appellant's opening brief much time was spent in discussing the case of *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* 183 Fed.2d 902, 20 A.L.R. 2d 695. In fact, appellant devoted his whole Appendix to a discussion of this case. We feel that this case is vital, since it discusses many principles involved here. Furthermore, appellant feels that if the court follows its own decision, it must find in favor of Bedal.

Appellees have made no effort to deny any of the arguments appellant has made concerning the *Booth-*

Kelly case. In the original litigation leading up to the *Booth-Kelly* case, an employee of the Southern Pacific Railroad Co. successfully sued the railroad. Later, the railroad sued the Booth-Kelly Lumber Company on the basis of implied indemnity and express contract indemnity. The lumber company urged that the negligence of the railroad was found in the first litigation to be the primary cause of the accident. The Court of Appeals in the former decision pointed out, however, that the sole question presented by the first litigation was whether or not the railroad was negligent. The Circuit Court stated there was no finding in the former case that the lumber company was negligent or whose negligence was primary and secondary. The court specifically pointed out that the first litigation was only determinative of the fact that the employee Powers was injured, the extent of the judgment, and that a contributing proximate cause of the employee's injury was the negligent failure of the Southern Pacific Co. to furnish him a safe place to work.

In this case, the lumber company is urging that in the Powell case Bedal's negligence was adjudicated. How can this be? The only party defendant in the Powell case was the railroad. Fortunately, we have before us the instructions of the trial court to the jury in the Powell case. (Exhibit 7.) The instructions to the jury are found on pages 182 through page 203 of exhibit 7. Nowhere in any of these instructions is Bedal's name mentioned. The court does not instruct the jury on any phase of the unloading operation. The only person against whom the court was instructing

was the railroad. On pages 186 and 187 of exhibit 7 the court tells the jury that the railroad is under a duty to furnish its employees with a reasonably safe place to work. Again, on page 188, the court tells the jury that the contributory negligence of Powell was no defense. The court reiterates on pages 202 and 203 of its instructions that in order to find against the railroads, the jury must find that the railroads were negligent and that such negligence was "in whole or in part the cause of plaintiff's injury." What basis is there then for appellees' assertion that the jury found Bedal was negligent? This case cannot be distinguished on this particular point from the *Booth-Kelly* case. Undoubtedly, in the *Booth-Kelly* case the trial court instructed the jury in a similar manner to the way the trial court in this case instructed the jury. The Court of Appeals for the Ninth Circuit correctly held that the question of the lumber company's negligence in the *Booth-Kelly* case was not an issue in the lawsuit between the employee and the Southern Pacific Railroad Co.

The appellees hopefully rely on the case of *Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 Fed. 2d 409, discussed in appellees' brief beginning on page 62. In the *Waylander* case the railroad was sued by an employee who was struck by a piece of timber that fell from a bridge being constructed by the Waylander-Peterson Co. Waylander-Peterson was brought in as a third party defendant and participated in the trial of the case. At the trial a contract was

introduced which provided that Waylander was to build a bridge over the railroad. A provision in it stated in substance that the contractor was forbidden from allowing material to fall off the bridge that might hit workmen on the trains. A timber did fall off the bridge at a time when there was no wind and hit the employee, who sued the latter under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq. At the trial the court submitted special interrogatories to the jury asking (a) if a piece of timber fell from the bridge and hit the employee and (b) whether or not the negligence of the contractor was the primary cause of the accident. The jury answered both questions in the affirmative. In addition, the court specifically instructed the jury upon the doctrine of *res ipsa loquitur*. It was upon this basis that the jury found the contractor negligent. In addition, the evidence submitted in the case showed, according to the remarks of the trial judge on page 416, repeated instances of timber and debris falling from the bridge.

Thus it can be seen that in the *Waylander* case the proposed third party indemnitor, a party to the original action, was bound by the jury's adjudication of its own negligence because the jury was specifically instructed to find whether or not the third party was negligent and whether its negligence was the primary cause of the accident. In this case, the judge did not instruct the jury in the Powell case on the theory of *res ipsa loquitur*. Nor could he have done so, for it

would not have been proper. In a logging operation, such as this, debris would customarily fly off logs as they were being unloaded and the accident itself was *not* such as in the ordinary course of things would not happen, except by the failure to exercise ordinary care. In addition, witness after witness testified who saw the accident happen. Furthermore, there was no reason in the Powell case for anyone to submit evidence as to how the logs were felled in the forest because that was not in issue and would not have been proper. The appellees do not suggest that the doctrine of *res ipsa loquitur* could uphold their judgment here because they knew the question was not submitted to the jury in the Powell case.

Thus, if Bedal is bound by what was found by the jury in the Powell case, these findings could in no way prejudice his case. When the lumber company sued on the theory of implied indemnity and relies on a former judgment as *res adjudicata,* it can only rely on that former judgment to the extent that facts were actually adjudicated therein. Bedal's negligence was not adjudicated in the Powell case. At the very least, Bedal is entitled to a jury trial. The lumber company has stated several times in its brief that Bedal cannot once again gamble on a jury. Bedal has never had a chance to even honestly present his case to a jury in the first instance. The only party that is afraid to have the case submitted to a jury is the lumber company, for the lumber company realizes that there is little gamble in it. It is so clear that

Bedal was not negligent that the jury would take very little time in bringing in a verdict for Bedal.

C. BEDAL IS ENTITLED TO HAVE EVERY SINGLE FACT ADJUDICATED IN THE POWELL CASE RELITIGATED AND SUBMITTED TO A JURY, INCLUDING THE RAILROADS' NEGLIGENCE IN THE FIRST INSTANCE AND THE ISSUE OF POWELL'S CONTRIBUTORY NEGLIGENCE.

The appellees have cited a host of cases quoting the general principles regarding the law of indemnity and implied indemnity. Appellant fully recognizes that the doctrine of implied indemnity is well established. The Court of Appeals for the Ninth Circuit in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* supra, has definitely examined the principle of implied indemnity. As we pointed out in our argument beginning on page 35 of our opening brief, a prior judgment and all of the facts necessarily adjudicated therein can only bind Bedal if Bedal was given notice, a tender of the defense, and an opportunity to defend the Powell case by the actual party defendant —the railroads—that participated in it. It will not be necessary to repeat the argument we made in our brief on this point, but we would like to clear up certain inferences made by the appellees in their brief.

The appellees have not cited a single case in which a third party has been bound by a former judgment where that party was not given notice and an opportunity to defend by one of the original litigants in the action. The court will recall that the railroads were

the only parties defendant in the original case. The lumber company had nothing to do with it. It was a stranger to the action. The railroads did not give Bedal notice nor afford him an opportunity to defend that suit. Only the railroads could bind Bedal to that suit. A stranger could not. But here, the lumber company says that its letter, Exhibit "F", was a tender of the defense of the Powell case. What may we ask did the lumber company have to tender? It had no control over the litigation and had no right to demand that anyone defend it. Consequently, Bedal had no duty to do so. We repeat that the appellees have not cited a single case in which a stranger to the judgment can bind another stranger to a judgment when neither of them were parties. We submit further that there is no such case in Anglo-American jurisprudence. The Restatement of the Law of Judgments, Section 107, contemplates that an indemnitor can only be bound by the former judgment where the indemnitee was a party to the prior action and gave sufficient notice and an opportunity to defend. Since Bedal had no duty to defend that case, he could not be bound by anything in it anymore than the alleged indemnitor could be bound in the case of *Crawford v. Pope & Talbot, et al.,* 206 Fed.2d 784 (1953).

The appellees on page 56 of their brief accused the appellant of sophistry. These words could more aptly be applied to the argument of the appellees beginning on page 69 of their brief in which they indicate no notice or opportunity to defend need be given

since Bedal admitted in his answer that he "failed and refused" to defend the Powell case. On page 3 of appellant's brief, paragraph X of the lumber company's complaint is set out in full. (Also see R. 61, 62 and 63.) Paragraph X was added to the lumber company's complaint by its own amendment. It is true that the lumber company notified Bedal of Powell's claim and of Powell's lawsuit against the railroads. It is true, also, that Powell received the letter attached to the complaint marked as Exhibit "F". This letter clearly was not a tender of the defense. Exhibit "F" should be contrasted with Exhibit "E", which is a proper tender of defense. Exhibit "E" was the letter sent to Bedal by the lumber company when the railroads sued the lumber company, which was almost a year and a half after the Powell case was tried.

Of course, the lumber company realized then, as it realizes now, that it had nothing to tender. Under these circumstances, Bedal admitted that he failed and refused to defend the first lawsuit. But there is no allegation in the complaint that Bedal failed and refused to defend the first lawsuit after the *railroads* gave notice and demanded that Bedal participate in the case. This was never done. This kind of an allegation would be essential to bind Bedal to the results of the first case.

The appellees have hopefully taken the words "failed and refused" to mean that Bedal categorically refused to defend the Powell case. This, of course, is

distorting the plain meaning of a common legal phrase. The words "failed and refused" mean little more in pleading than that Bedal neglected or failed to defend the first case. The admission by Bedal was intended to mean only that and could only mean that. The appellees have taken the word "refused" out of the context of paragraph X of their complaint and tried to build their case around it. On page 69 of their brief they point out that a tender is not required where an express, categorical refusal is manifested in advance. This, of course, is true. But here the lumber company set out its tender and alleges that it is a tender. The letter Exhibit "F", clearly tenders nothing. Furthermore, there is no specific allegation that Bedal refused to defend the lawsuits at any particular time or place, and that this refusal was manifested to the lumber company. The words "failed and refused" simply mean that Bedal failed to defend the Powell case. This Bedal admits. The question of what the words "failed and refused" mean were taken up by the Sixth Circuit in *Mackey v. United States,* 290 F. 18, 21. In that case the court was construing a charge in an indictment for embezzlement which provided in part that the defendant" failed and refused to remit funds in his possession on the 11th day of December, 1919, to the designated depository; * * *." The court, in examining the words "failed and refused" stated:

> " 'to refuse' does not necessarily imply a precedent demand, deliberately denied. 'To fail and refuse' is a common legal phrase, implying only that conventional refusal which is inherent in

> mere failure. In the face of this common meaning of the word, an allegation in an indictment that defendant 'failed and refused' should not be expanded to carry the implication that there was a deliberate intention and inexcusable refusal to comply with the statute either with or without demand therefor."

There can be no difference in the way the words "failed and refused" were used in the case just quoted and the way they were used in the lumber company's complaint. Actually, even if Bedal did refuse actively and consciously to defend the case after a tender, or before a tender by the lumber company, this would still be irrelevant. Only overt action by the *railroad* could have bound Bedal to the prior judgment.

Of course, because Bedal is making this argument, which we seriously urge, Bedal does not feel that even if he were bound by the prior adjudication that there was any evidence of Bedal's negligence, nor was the question of his negligence presented to the jury in the Powell case. Bedall is making this additional argument because he feels that the issue of the railroads' negligence must, as against Bedal, be once again litigated by a jury as well as the question of Powell's contributory negligence.

D. SINCE THERE IS NO EVIDENCE OF BEDAL'S NEGLIGENCE IN THE RECORD, HE IS ENTITLED TO A DIRECTED VERDICT, AND IN ANY EVENT, BEDAL IS ENTITLED TO HAVE THE ISSUES OF HIS NEGLIGENCE, THE RAILROADS' NEGLIGENCE, POWELL'S CONTRIBUTORY NEGLIGENCE AND WHETHER OR NOT BEDAL WAS THE PRIMARY WRONGDOER SUBMITTED TO A JURY.

A logging operation by its very nature entails certain risks. But the mere fact that an operation is risky, such as unloading logs, or felling trees in the forest, does not mean that it is negligent when it is being done in the customary and usual manner. Whether the railroad, knowing what it did about the unloading operation, was negligent in failing to provide Powell with a safe place to work, and whether or not it acquiesced in the condition as it then existed, was a question for the jury. Restatement of the Law of Restitution, Section 95. The trial court failed to submit this question to the jury and Bedal submits that it was error.

The lumber company admits in its brief that the only reason it was held liable to the railroads was because of its contract to indemnify the railroads against the railroads' own negligence. The court so construed the contract. Of course, the lumber company in its suit against Bedal must stand in the railroad's shoes as its subrogee. If the railroad was negligent and the railroad's negligence was the primary cause of the injury to Powell, and not any negligence of Powell's, the lumber company is precluded from any action over. The lumber company does not deny this principle of law and fails to distinguish the case

of *Massachusetts Bonding & Insurance Co. v. Dingle-Clark Co.,* 52 N.E.2d 340. In that case an insurance company was held to stand in the shoes of the assured in asserting a right over against a third party.

Not only does the lumber company contend that Bedal has been adjudged negligent in the Powell case, but it contends that it has also been adjudged that Bedal's negligence was the primary cause of Powell's injury. In considering the question of implied indemnity, the courts distinguish between passive and active negligence. It presents a jury question in each case, as to whether or not prior adjudicated negligence is active or passive. This was held to be so in *Booth-Kelly Lumber Co. v. Southern Pacific Co.,* supra. The appellees do not discuss this question at any length because it is clear that the trial court erred in failing to submit that question to the jury.

Bedal has never had an opportunity to have the question of Powell's contributory negligence submitted to a jury. Though this defense is denied the railroads under the Federal Employer's Liability Act, it is available to Bedal. Powell's contributory negligence has not been litigated even against the railroads. Since Bedal was not a party to the Powell case and not noticed in to defend that case by the railroads, he has a right to have this issue passed on by a jury. These facts distinguish this case from those cited on pages 43-46 of appellees' brief, in which a few courts have held that a valid defense is not available to a party that is properly noticed in as a third party defendant.

Thus, Bedal contends that in each one of these instances the trial court committed reversible error and denied Bedal his constitutionally guaranteed right of a jury trial. Certainly, from the evidence presented in both the Powell case and in the cases from which this appeal is taken, there is ample evidence from which a jury could conclude that Bedal was not negligent and that the sole, proximate cause of the accident was the negligence of the railroads or the contributory negligence of Powell.

E. THE LOGGING CONTRACT ENTERED INTO BETWEEN BEDAL AND THE LUMBER COMPANY IS NOT AN INDEMNITY AGREEMENT.

Appellant feels that he had discussed the question of whether or not the logging contract is an indemnity agreement at sufficient length in his original brief. See pages 73 et seq. The appellees have construed a paragraph from the contract which is clearly intended to show that the logging agreement was made with an independent contractor to mean that Bedal agrees to indemnify the lumber company against its *contractual* obligation with a third party—the railroad. In our opinion, Bedal has failed to properly distinguish our cases, particularly in view of the fact that it stands in the same shoes as the railroad. The railroad was adjudged negligent in the Powell case. As its subrogee and since it was liable to the railroad, it cannot now claim that it stands in a better position than the railroads. For example, on page 31 of their brief the ap-

pellees state that under no theory can the lumber company be charged with negligence. This does not properly distinguish the cases discussed by them on pages 31-33 of their brief.

How the appellees are able to distort plain language to arrive at a meaning favorable to them is amply illustrated in their vain attempts to define the word "incur". If incur means—as they say it does—"cast upon" or "incur liability", then indeed they are arriving at a strange conclusion. Had Bedal "incurred" any claim? Have any claims been cast upon him? As the lumber company admits, the single solitary reason that it was liable to the railroads was because of its contractual agreement with them. If it were the intention of the lumber company to make Bedal liable because of the railroads' contract with the lumber company, it could have done so by including such a provision in the logging contract. It did not.

The lumber company has cited a number of general principles in its brief concerning the construction of contracts. No one can disagree with these general principles of law. The court should note, though, that the lumber company does not cite a single case in which similar language has been used in a contract and a court has arrived at the result that the lumber company desires here. The Tenth Circuit Court of Appeals in *Sinclair Prairie Oil Co. v. Thornley,* 127 F.2d 128, expressly held that an agreement to carry liability insurance was not an agreement to indemnify.

Appellant feels that the lumber company must realize its awkward position here, particularly in view of the words it quotes from *Caldwell State Bank v. First National Bank,* 49 Ida. 110, 286 Pac. 360. On page 24 of its brief the lumber company quotes from the case a statement of the Idaho court in which it says that the actual meaning should prevail over dry words of an instrument "inapt expressions, and careless recitals therein, unless the intention runs counter to the plain sense of the binding words of the agreement." Appellant will agree that if the words "claim and incur", common ordinary words, can have the distorted meaning that the lumber company contends, then indeed it must constitute an inapt expression. It is only now that counsel for the lumber company seriously contend that this contract is a contract of indemnity. In its argument to the trial court below, in support of its motion for a directed verdict, counsel did not mention the logging contract as being one of indemnity. (R. 245, 247.) Appellant feels that it is so apparent that the trial court committed error in failing to allow Bedal's case to go to the jury and, in fact, failing to grant Bedal a directed verdict, that it is the lumber company's sole hope that it may win this case on appeal by virtue of its contractual arrangement with Bedal.

The lumber company argues on pages 26 and 27 of its brief that it is natural for the lumber company to have indemnified itself by reason of its contract with the railroads. We might argue that it is not natural,

but we don't think it is important. The fact remains that the lumber company did not put such a provision in its contract.

Next, the lumber company wishes to construe the word "claim" to mean a "contract claim". If this was the case, the agreement in question would read "that under no circumstances or conditions was the lumber company to become liable for any contract claim whatsoever which may be incurred by Bedal." Still, we insist that no contract claims have been cast upon Bedal or incurred by him. It is obvious that this paragraph was put in the contract between Bedal and the lumber company to make it clear to the world that Bedal was an independent contractor and not a servant or agent of the lumber company. The words contain no promise of indemnity. Also, appellant would like to point out that the logging contract was primarily concerned with the arrangements between the parties to cut, haul and skid logs and then ultimately to unload them at Banks, Idaho. Appellees failed to cite a single case which supports their position that the paragraph they construe in the contract results in a promise by Bedal to indemnify the lumber company. A case to support appellees is particularly difficult to find when they seek indemnity from Bedal as a result of an unfortunate provision in their contract with the railroads.

CONCLUSION.

The appellant respectfully submits that the action of the trial court in directing a verdict in favor of the lumber company should be reversed, and the trial court should be directed to enter a verdict in favor of Bedal. In the alternative, Bedal respectfully submits that the directed verdict of the trial court below in favor of the lumber company should be reversed and the question of Bedal's negligence, the question of Powell's contributory negligence, the question of whose negligence is primary or secondary, and the question of whether or not the railroads were a joint-tort feasor, be submitted to a jury.

Dated, Boise, Idaho,
June 21, 1954.

Respectfully submitted,
ELAM AND BURKE,
By LAUREL E. ELAM,
CARL A. BURKE,
CARL P. BURKE,
FRED M. TAYLOR,
Attorneys for Appellant.

No. 14204

United States Court of Appeals

for the Ninth Circuit

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-19-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

NELSON ROSEN, ESQ.,

RAYMOND C. SANDLER, ESQ.

For Respondent:

W. LEE McLANE, ESQ.

Tax Court of the United States

Docket No. 27910

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1950

Apr. 26—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 26—Copy of petition served on General Counsel.

May 4—Request for hearing to be held in Los Angeles, California, filed by taxpayer. 5/11/50 Granted.

May 31—Entry of appearance of Raymond C. Sandler as counsel and to receive service of papers filed.

May 31—Answer filed by General Counsel.

June 8—Copy of answer served on taxpayer Los Angeles.

1951

Nov. 21—Hearing set February 4, 1952, Los Angeles.

1952

Feb. 5, 6, 13—Hearing had before Judge Raum, on merits. Record to be left open for deposition of Mr. Bentel. Stipulation of facts filed 2/5/52. Supplemental stipulation of facts filed 2/13/52. Petitioner's brief due March 31/52. Respondent's brief due April 30/52. Petitioner's reply brief due May 20/52.

Mar. 3—Transcript of hearing 2/5/52 filed.

Mar. 3—Transcript of hearing 2/6/52 filed.

Mar. 3—Transcript of hearing 2/13/52 filed.

Mar. 27—Brief filed by taxpayer. Copy served.

Apr. 22—Motiton for extenson to June 2, 1952, to file reply brief filed by General Counsel. 4/23/52 Granted.

June 2—Answer brief filed by General Counsel.

June 30—Reply brief filed by taxpayer. 7/1/52 Copy served.

Nov. 21—Memorandum findings of fact and opinion rendered, Raum, Judge. Decision will be entered for the respondent. Copy served.

Nov. 25—Decision entered, Raum, Judge, Div. 11.

Dec. 15—Motion for reconsideration of opinion filed by taxpayer.

Dec. 15—Motion for a full Court review filed by taxpayer. 1/3/53 Denied.

1953

Jan. 6—Order that petitioner's motion of 12/15/52 is granted and a copy of said motion shall be served on respondent, further order, that respondent in this proceeding is granted leave to file, on or before 2/9/53, a reply to the "argument" which was incorporated in motion for reconsideration, entered. 1/7/53 Copy served.

Jan. 21—Application for permission to file motion to vacate decision pending reconsideration of memorandum opinion, motion lodged, filed by petitioner. 1/23/53 Application granted.

Jan. 23—Order, that decision entered November 25, 1952, is vacated and set aside entered. 1/26/53 Copy served.

Feb. 9—Motion for extension to February 23, 1953, to file brief in answer to petitioner's argument filed by General Counsel. 2/10/53 Granted.

Feb. 24—Reply brief filed by General Counsel.

Sept. 25—Findings of fact and opinion rendered, Raum, Judge. Decision will be entered for the respondent. Copy served.

Sept. 29—Decision entered, Judge, Raum, Div. 11.

Dec. 18—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer with affidavit of service by mail attached.

1953

Dec. 18—Proof of service by mail of petition for review filed.

Dec. 18—Designation of contents of record on review with affidavit of service by mail attached, filed by petitioner.

The Tax Court of the United States

Docket No. 27910

JAMES M. FIDLER

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (LA:IT:90D:CTF) dated January 31, 1950, and as a basis for his proceedings, alleges as follows:

I.

The petitioner is an individual whose present mailing address is 1759 N. Gower Street, Los Angeles 28, California. The returns for the years here involved were filed with the Collector for the Sixth District of California, Los Angeles, California.

II.

The Notice of Deficiency a copy of which is attached and marked "Exhibit A," is dated January 31, 1950.

III.

The taxes in controversy are income tax for the calendar year 1944 in the amount of $7,316.60, income tax for the calendar year 1945 in the amount of $10,293.79, and income tax for the calendar year 1946 in the amount of $6,992.74.

IV.

The determination of taxes set forth in the said Notice of Deficiency is based upon the following errors:

A. The Commissioner erred: in determining that payments in the amount of $9,000.00 made by petitioner during the calendar year 1944 to his former wife, Ruth Law Fidler, as alimony, support and maintenance, does not qualify as a proper deduction under the provisions of section 23(u) of the Internal Revenue Code; and in disallowing such payments as a deduction and in adding said amount of $9,000.00 to petitioner's taxable income for the calendar year 1944.

B. The Commissioner erred: in determining that payments in the amount of $9,600.00 made by petitioner during the calendar year 1945 to his former wife, Ruth Law Fidler, as alimony, support and maintenance, does not qualify as a proper deduction under the provisions of section 23(u) of the Internal

Revenue Code; and in disallowing such payments as a deduction and in adding said amount of $9,600.00 to petitioner's taxable income for the calendar year 1945.

C. The Commissioner erred: in determining that payments in the amount of $9,600.00 made by petitioner during the calendar year 1946 to his former wife, Ruth Law Fidler, as alimony, support and maintenance, does not qualify as a proper deduction under the provisions of section 23(u) of the Internal Revenue Code; and in disallowing such payments as a deduction, and in adding said amount of $9,600.00 to petitioner's taxable income for the calendar year 1946.

D. The Commissioner erred: in determining that the loss sustained by petitioner in the calendar year 1945 in the amount of $4,750.00 from the sale of books and manuscripts is a loss from the sale of capital assets held for more than six months and subject to the provisions of section 117(b) and (d) of the Internal Revenue Code; in refusing to determine such loss to be one from sale of property other than capital assets; and in refusing to allow such loss as a deduction in the amount of $4,750.00 from petitioner's taxable income for the calendar year 1945 and in determining that petitioner was entitled to a deduction on account of said loss in only the amount of $2,375.00.

E. The Commissioner erred in determining the net income of petitioner for the calendar year 1944 to be $72,725.12 instead of $63,725.12.

F. The Commissioner erred in determining petitioner's income tax liability for the calendar year 1944 to be $45,398.95 instead of $38,082.35.

G. The Commissioner erred in determining the net income of petitioner for the calendar year 1945 to be $72,352.75 instead of $60,003.50.

H. The Commissioner erred in determining petitioner's income tax liability for the calendar year 1945 to be $45,371.31 instead of $35,077.52.

I. The Commissioner erred in determining the net income of petitioner for the calendar year 1946 to be $75,126.50 instead of $65,900.75.

J. The Commissioner erred in determining petitioner's income tax liability for the calendar year 1946 to be $42,703.85 instead of $35,711.11.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. Petitioner and Ruth Law Fidler, also known as Roberta L. Fidler, were married on or about February 20, 1936.

B. Thereafter, and prior to February 4, 1944, unhappy differences arose between petitioner and said Ruth Law Fidler and they commenced to live separate and apart from one another.

C. On February 4, 1944, petitioner and said Ruth Law Fidler, under the name of Roberta L. Fidler,

executed a written agreement of settlement and separation, whereby, among other things, petitioner agreed to make periodic payments of money to said Ruth Law Fidler as alimony and for her future support and maintenance, that said payments would be made by petitioner on the first day of each calendar month thereafter to and including the 1st day of August, 1948, and that said monthly payments would be not less than $500.00 per month and not more than $800.00 per month, the exct amount of each payment to depend upon the amount of compensation to be thereafter received by petitioner pursuant to a certain radio contract under which petitioner was then engaged to render services and/or the continuance of said radio contract and/or petitioner's future employment under a similar radio contract, in accordance with a formula set forth in said agreement.

D. On March 20, 1944, the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine, ordered, adjudged and decreed that the marriage relationship then and theretofore existing between petitioner and said Ruth Law Fidler be dissolved and that said parties be restored to the status of single persons; that by the terms of said decree of divorce, said court confirmed, ratified, approved and adopted as a part of its decree the aforesaid settlement and separation agreement entered into between the parties on February 4, 1944. That as a part of its decree, said court ordered, adjudged and decreed that petitioner make payments to said Ruth Law Fidler for her support and maintenance, in terms as follows:

"It Is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any time before August 1, 1948, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract, and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder."

That your petitioner is the defendant referred to in said decree and order and that Ruth Law Fidler is the plaintiff referred to therein.

E. Pursuant to and subsequent to said decree of divorce, petitioner made periodic payments to said Ruth Law Fidler for her support and maintenance

during the calendar year 1944 in the total amount of $7,200.00.

F. Pursuant to and subsequent to said decree of of divorce, petitioner made periodic payments to said Ruth Law Fidler for her support and maintenance during the calendar year 1945 in the total amount of $9,600.00.

G. Pursuant to and subsequent to said decree of divorce, petitioner made periodic payments to said Ruth Law Fidler for her support and maintenance during the calendar year 1946 in the total amount of $9,600.00.

H. In 1937, petitioner entered upon and into the business of buying, selling, licensing and otherwise dealing in literary properties for financial profit. In order to engage in such business, and more particularly in order to have a stock of such properties to offer to prospective purchasers, petitioner in 1937 purchased motion picture and other literary rights in and to approximately 75 published novels and stage plays and approximately 2,000 original manuscripts, scenarios, and motion picture shooting scripts, at a cost of $5,000.00. Petitioner thereafter offered to sell and attempted to sell from said stock of literary properties to motion picture producers and other purchasers and users of such properties in the theatrical, motion picture and radio industries but was unsuccessful in his efforts to obtain buyers therefor. In the calendar year 1945, petitioner sold his entire stock of literary properties, as aforesaid, for the

sum of $250.00, thereby sustaining and incurring a loss in said business in the amount of $4,750.00.

Wherefore, the petitioner prays that this Court may hear this proceeding and:

1. Determine that the Commissioner erred in his determinations as hereinbefore set forth;

2. Determine that there is no deficiency in petitioner's income tax for the calendar years 1944, 1945 and 1946; and

3. Grant such other relief as the Court may deem proper.

/s/ NELSON ROSEN,
Attorney for Petitioner.

ZAGON, AARON AND SANDLER,
Of Counsel for Petitioner.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Jan. 31, 1950.

Office of
Internal Revenue Agent in Charge
Los Angeles Division

LA:IT:90D:CTF

Mr. James M. Fidler,
1759 North Gower Street,
Los Angeles 28, California.

Dear Mr. Fidler:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944, 1945 and 1946, discloses a deficiency of $24,603.13, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington

25 D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates, 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner,

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

Statement

LA:IT:90D:CTF

Mr. James M. Fidler
1759 North Gower Street
Los Angeles 28, California

Tax Liability for the Taxable Years Ended
December 31, 1944, 1945 and 1946

Year	Deficiency
1944 Income tax	$ 7,316.60
1945 Income tax	10,293.79
1946 Income tax	6,992.74
Total	$24,603.13

In making this determination of your income tax liability careful consideration has been given to the reports of examination, copies of which were sent you on April 10, 1947; October 13, 1948, and February 3, 1949; to your protests dated June 10, 1947; December 10, 1948, and March 2, 1949; and to the statements made at the conferences held.

The amounts $9,000.00, $9,600.00 and $9,600.00 claimed as deductions in your income tax returns for the taxable years 1944, 1945 and 1946, respectively, as alimony have been added to your taxable income for such years. It has been determined that said amounts do not qualify as proper deductions under the provisions of section 23(u) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. Glenn Brownfield, 704 South Spring Street, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustment to Net Income
Taxable Year Ended December 31, 1944

Net income as disclosed by return	$63,725.12
Unallowable deduction:	
(a) Alimony deduction disallowed	9,000.00
Net income adjusted	$72,725.12

Explanation of Adjustment

(a) This adjustment has been previously explained.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted		$72,725.12
Less: Excess of net long-term capital gain over net short-term capital loss		838.69
Ordinary net income		$71,886.43
Less: Surtax exemptions		1,000.00
Balance (surtax net income)		$70,886.43
Surtix on $70,886.43		$42,838.01
Ordinary net income	$71,886.43	
Less: Normal tax exemption	500.00	
Balance subject to normal tax	$71,383.43	
Normal tax (3 per cent of $71,386.43)		2,141.59
Partial tax		$44,979.60
Plus: 50 per cent of $838.69		419.35
Alternative tax		$45,398.95

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	$72,725.12	
Less: Surtax exemptions	1,000.00	
Surtax net income	$71,725.12	
Surtax		$43,517.35
Net income adjusted	$72,725.12	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax	$72,225.12	
Normal tax at 3%		2,166.75
Total normal tax and surtax		$45,684.10
Alternative tax		$45,398.95
Correct income tax liability		$45,398.95
Income tax liability shown on return, account No. 3011985		38,082.35
Deficiency of income tax		$ 7,316.60

Adjustments to Net Income
Taxable Year Ended December 31, 1945

Net income as disclosed by return	$60,003.50
Unallowable deductions:	
(a) Alimony deduction disallowed	9,600.00
(b) Loss from sale or exchange of property other than capital assets eliminated	4,750.00
Total	$74,353.50
Decrease in income:	
(c) Net loss from the sale or exchange of capital assets allowed	2,000.75
Net income adjusted	$72,352.75

Explanation of Adjustments

(a) This adjustment has been previously explained.

(b) The loss from sale of Seelig Library claimed as a loss from sale of property other than capital assets has been eliminated due to adjustment (c) below.

(c) The ordinary loss claimed of $4,750.00 from sale of Seelig Library of books and manuscripts has been determined to be a loss from the sale of capital assets held for more than six months and subject to the provisions of section 117(b) and (d) of the Internal Revenue Code. Computation of the adjustment of $2,000.75 is shown below:

Total short-term capital loss as claimed in return	($ 790.00)
Total long-term capital gain as reported in return	1,790.75
Long-term capital loss determined from sale of Seelig Library (50% of $4,750.00	(2,375.00)
Net loss from the sale or exchange of capital assets	($1,374.25)
Net loss deductible in 1945 under section 117(d)	($1,000.00)*
Net gain reported	1,000.75
Decrease in income	$2,000.75

*The balance of the loss in the amount of $374.25 constitutes a capital loss carry-over under the provisions of section 117(e), I.R.C.

Computation of Tax
Taxable Year Ended December 31, 1945

Net income adjusted	$72,352.75	
Less: Surtax exemptions	1,000.00	
Surtax net income	$71,352.75	
Surtax		$43,215.73
Net income adjusted	$72,352.75	
Less: Normal-tax exemption	500.00	
Net income subject to normal tax	$71,852.75	
Normal tax at 3%		2,155.58
Correct income tax liability		$45,371.31
Income tax liability shown on return, account No. 90991345		35,077.52
Deficiency of income tax		$10,293.79

Adjustments to Net Income
Taxable Year Ended December 31, 1946

Net income as disclosed by return	$65.900.75
Unallowable deduction:	
(a) Alimony deduction disallowed	9,600.00
Total	$75,500.75
Decrease in income:	
(b) Net gain from the sale or exchange of capital assets decreased	374.25
Net income adjusted	$75,126.50

Explanation of Adjustments

(a) This adjustment has been previously explained.

(b) The net gain from the sale of capital assets reported in the amount of $2,175.68 has been decreased, due to a capital loss carry-over from the year 1945, in the amount of $374.25 allowed under the provisions of section 117(e) of the Internal Revenue Code.

Net long-term capital gain reported	$2,175.68
Short-term capital loss allowed (as explained above)	374.25
Net capital gain corrected	$1,801.43

Computation of Alternative Tax
Taxable Year Ended December 31, 1946

Net income adjusted		$75,126.50
Less: Excess of net long-term capital gain over net short-term capital loss		1,801.43
Ordinary net income		$73,325.07
Less: Exemptions		1,000.00
Balance, subject to surtax and normal tax		$72,325.07
Tentative surtax	$41,833.55	
Tentative normal tax at 3%	2,169.75	
Total tentative tax	$44,003.30	
Less 5%	2,200.17	
Partial tax		$41,803.13
Plus: 50 per cent of $1,801.43		900.72
Alternative tax		$42,703.85

Computation of Tax
Taxable Year Ended December 31, 1946

Net income adjusted		$75,126.50
Less: Exemptions		1,000.00
Balance, subject to surtax and normal tax		$74,126.50
Tentative surtax	$43,238.67	
Tentative normal tax at 3%	2,223.80	
Total tentative tax	$45,462.47	
Less 5%	2,273.12	
Total normal tax and surtax		$43,189.35
Alternative tax		$42,703.85
Correct income tax liability		$42,703.85
Income tax liability shown on return, account No. 3056288		35,711.11
Deficiency of income tax		$ 6,992.74

Duly verified.

Served April 26, ~~1952.~~ 1950

Received and filed April 26, ~~1952,~~ 1950 T.C.U.S.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I., II. and III.

Admits the allegations contained in paragraphs I, II and III of the petition.

IV.

A. to J., inclusive. Denies the allegations of error contained in subparagraphs A to J, inclusive, of paragraph IV of the petition.

V.

A. and B. Admits the allegations contained in subparagraphs A and B of paragraph V of the petition.

C. Admits that petitioner and Ruth Law Fidler, under the name of Roberta L. Fidler, executed a written agreement of settlement and separation dated February 4, 1944. Denies the remainder of the allegations contained in subparagraph C of paragraph V of the petition.

D. Admits that the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine, ordered, adjudged and decreed that the marriage relationship between petitioner and

said Ruth Law Fidler be dissolved and that said parties be restored to the status of single persons. Denies the remainder of the allegations contained in subparagraph D of paragraph V of the petition.

E. to H., inclusive. Denies the allegations contained in subparagraphs E to H, inclusive, of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC.
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

L. C. AARONS,
Special Attorneys, Bureau of
Internal Revenue.

Received and Filed May 31, 1950, T.C.U.S.

The Tax Court of the United States

Docket No. 27910

JAMES M. FIDLER

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PROCEEDINGS

Circuit Court of Appeals Court Room
Sixteenth Floor, Federal Building
Los Angeles, California

February 5, 1952—2:00 P.M.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances:

NELSON ROSEN,
Appearing for the Petitioner.

W. LEE McLANE, JR.,
Honorable Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, Appearing for the Respondent.

The Clerk: Docket 27910, James M. Fidler.
State your appearances for the record, please.
Mr. Rosen: Nelson Rosen for the Petitioner.

Mr. McLane: W. Lee McLane, Jr., for the Respondent.

The Court: You may proceed.

Mr. Rosen: Your Honor please, I believe that counsel for the government and I have been able to eliminate the necessity for awaiting the transcript of the proceedings to which we referred when your calendar was called the other day.

We have entered into a stipulation of facts, which likewise refers to various documents, which I believe will tend to shorten the trial of the case considerably.

Does your Honor desire an opening statement at this time?

The Court: If you care to make one, you may do so.

OPENING STATEMENT ON BEHALF OF THE PETITIONER

By Mr. Rosen:

I think that the petition on file indicates some degree of the nature of the questions which are posed. We have here a petition for redetermination of a proposed deficiency, which arises out of the refusal of the Bureau to allow certain deductions which the Petitioner took during the years 1944, 1945 and 1946, as alimony, [3*] pursuant to Sections 23(u) and 22(k) of the Internal Revenue Code.

An incidental question involved pertains to whether or not a loss which the Petitioner sustained in connection with the purchase and sale of a stock of literary properties should be allowed as an ordinary

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

business loss or should be limited to a capital loss.

The alimony question is the principal question involved. The deficiency is proposed with respect to three years, the years 1944, 1945 and 1946.

The facts briefly are, your Honor, that Mr. Fidler, the Petitioner, and his wife, former wife, I should say, Ruth Law Fidler, were married on or about February 20, 1936. Thereafter, and some time prior to February 4, 1944, unhappy differences arose between the parties and they separated. There was one minor child of the mariage, an adopted infant.

In August of 1943, an agreement of settlement and separation was entered into between Mr. Fidler and Mrs. Fidler, the terms of which were substantially that Mr. Fidler undertook to pay to his wife and deliver to her properties amounting to approximately $20,000.00 in value, as her share of the property of the community.

In addition thereto he agreed to pay to her the sum of $500.00 per month for a period of three years. And, likewise, agreed to pay to her an additional sum of $500.00 [4] per month for an additional two years, provided she did not remarry during that last two years. The custody of the child was to be with Mr. Fidler exclusively.

Thereafter, shortly after the execution of that agreement, it was modified to eliminate the condition with respect to the payment of $500.00 per month for the last two years of the five-year period contemplated by the original contract with the result that if Mrs. Fidler remarried, the $500.00 per

month would still be paid for that remaining two years.

Thereafter, in December of 1943, at the request of Mrs. Fidler, still another amendment was made. The result of this amendment was that the custody of the child would be divided equally between Mr. and Mrs. Fidler, and during the six months' period of each year that the child remained with Mrs. Fidler, Mr. Fidler would pay to her support for the child in an amount designated.

Thereafter, and in February of 1944, still additional demands were made by Mrs. Fidler, with the result that the parties, through their respective counsel, entered into what I refer to as a final agreement between the parties.

In substance, your Honor, that agreement provided that in addition to the $20,000.00 theretofore paid by Mr. Fidler to Mrs. Fidler as her share of the property, Mr. Fidler would transfer and assign to her cash and/or securities [5] in an additional amount of $7,000.00, thereby making a total amount of $27,000.00.

In addition to the agreement of Mr. Fidler to pay $500.00 per month for aproximately five years, as contemplated by the original agreement, Mr. Fidler undertook the additional obligation to pay an additional $300.00 per month for a period of approximately, I think, 54 months from the date of that agreement provided that his compensation which he was then receiving under a radio contract was not reduced during that term.

That additional obligation to pay an additional

$300.00 per month incidentally, was evidenced by a promissory note described in the agreement. The result of that agreement was, your Honor, that in any event Mrs. Fidler would be paid $500.00 per month for her support and maintenance. If Mr. Fidler's compensation under his radio contract did not drop, she would be paid an additional $300.00. If his compensation during that term were reduced, the $300.00 would be reduced in proportion.

If the compensation were entirely eliminated, if, for example, he had no contract at all during that period of time, he would be under no obligation to pay her that $300.00. With the result it was, in effect, an agreement to pay a minimum of five and a maximum of eight.

Shortly thereafter, Mrs. Fidler filed suit for [6] divorce in White Pine County, the State of Nevada. The case, of course, virtually went by default, although a formal appearance was entered on Mr. Fidler's behalf by some local attorney in the small town, the County Seat, where the action was filed. A decree of divorce was rendered in her favor on March 20, 1944.

For some reason, of which we have no knowledge, the Court, in accordance with the request of Mrs. Fidler, to grant her a divorce and approve the property settlement agreement, did grant a divorce, did grant to her the custody of the child, in accordance with the terms of the agreement, and did ratify, approve the agreement, the settlement agreement of the parties. And did direct Mr. Fidler to pay $200.00 per

month for the support of the child in accordance with the terms of the agreement. And then computed——

The Court: That was over and above the $800.00 you spoke of?

Mr. Rosen: Oh, yes. In addition to the $800.00 per month, Mr. Fidler obligated himself to pay $200.00 a month for the support of the child during the months the child was with Mrs. Fidler.

The decree was concluded by stating, the formal decree, "That the defendant shall pay to the plaintiff, in accordance with the terms of the said settlement agreement, the sum of $800.00 a month, commencing forthwith and continuing [7] for a period of five years."

Shortly thereafter the Court ordered the decree be amended to comply with the terms of the agreement, and an amended decree of divorce was filed.

Pursuant to the decree and the agreement, Mr. Fidler, commencing on April 1, 1944, paid his wife the sum of $800.00 per month through and including the month of December, 1946, in addition to the sums paid for the support of the child.

The Bureau has disallowed the deductions which Mr. Fidler took with respect to $7200.00 in alimony paid for nine months during the year 1944 and 12 months in each of the years 1945 and 1946, upon the theory stated in the report of examination——

Mr. McLane: Is that the agent's report, Mr. Rosen?

Mr. Rosen: Yes. ——upon the theory stated in the agent's report, that the alimony payments made by Petitioner to Ruth Law Fidler during the years

1944, 1945 and 1946, "are disallowed as deductions to Petitioner, for the reason that the periodic payments were for a period of less than ten years."

That seems to have been the basis upon which those deductions were disallowed. And we, of course, contend, your Honor, that consistent with the views expressed in the Lee case and the Keith case, I believe, to the effect that where the total amount to be paid by the husband to the wife is [8] contingent upon the earnings of the husband, the sums paid and payable qualify as periodic payments, notwithstanding that the term of payment does not extend over a period of ten years. That, of course, is the principal issue involved.

In addition, with respect to the year 1945, there is this additional side issue presented by this case: Mr. Fidler has been a radio commentator and news reporter for a number of years. In addition thereto he has written a column that appears in some of the papers.

In 1937 he was aproached by a friend of his, who is a literary property broker in the Hollywood area. A literary property broker is one who sells literary properties, books, stories and the like, to the studios. And he advised Mr. Fidler that a Mr. Selig had a large stock of literary properties, consisting of some 75 stage plays and novels and approximately 2,000 stories, motion picture rights thereto, which could be purchased for about $5,000.00, and that he believed that there were some very good stories in this stock which could be resold to some of the studios. He felt that Mr. Fidler could make some money if

he wanted to buy this stock of literary properties and attempt to dispose of them piecemeal.

Mr. Fidler did and turned them over to this literary broker, and after the cost of $5,000.00 had been recouped that they would share the profits equally. Unfortunately, although [9] they had some indications that some of the studio producers were interested in some of the stories, their efforts during this entire period of time, 1937 to 1945, proved to no avail, and finally in 1945 Mr. Fidler decided he would just sell it all, lock, stock and barrel, and did. He sold the entire stock for $250.00.

We contend, under the circumstances, which the evidence will reflect, and under the statements I have outlined that Mr. Fidler was entitled to deduct the sum of $4,750.00 for the loss occurring by the difference between what he paid and the amount he received for the stock as an ordinary loss.

The government takes the position it is a loss from ordinary capital assets.

That, in brief, your Honor, is the situation. I think we have a stipulation that will tend to expedite the trial of the case.

OPENING STATEMENT ON BEHALF OF THE RESPONDENT

By Mr. McLane:

May it please the Court, this is a case involving the Petitioner's income tax for the years 1944, 1945 and 1946. The Commissioner of Internal Revenue in his Notice of Deficiency dated January 31, 1950, de-

termined deficiencies in Petitioneer's income tax of $7,316.60 for 1944, $10,293.79 for 1945, and $6,992.74 for 1946. The [10] entire amount in each year is in controversy.

The deficiencies for 1944 and 1946 are based on the disallowance of alimony deductions of $9,000.00 and $9,600.00, respectively, while the 1945 deficiency is based on the disallowance of a $9,600.00 alimony deduction and a $4,750.00 ordinary loss deduction.

The question regarding the alimony deduction for each of the taxable years is whether the Petitioner is entitled to such deductions under Section 23(u) of the Internal Revenue Code.

The Court: I understood the Petitioner's counsel to state for the year 1944 only $7,200.00 was involved.

Mr. McLane Yes, your Honor. I understand there is a concession of $1,800.00.

Mr. Rosen: Your Honor please, apparently when the return was originally filed for the year 1944, Mr. Fidler's accountant attempted to take $9,000.00 as a deduction. It is my position, and I am ready to concede, your Honor, that in so far as any payments which were made prior to the decree of divorce on March 20, 1944, that they would not be deductible. We are accordingly limiting our prayer for relief to the sum of $7,200.00 from April 1, 1944, through to December.

Mr. McLane: Continuing then for the Respondent, if the payments are not includable in the gross income of [11] Mr. Fidler's former wife, under Sec-

tion 22(k), the Petitioner is not entitled to deductions under Section 23(u).

Section 22(k) provides that "In the case of a wife who is divorced from her husband, under a decree of divorce, periodic payments received subsequent to such decree, in discharge of legal obligation, which, because of the marital relationship is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce, shall be includable in the gross income of such wife. However, installment payments disharging a part of an obligation, the principal sum of which is in terms of money or property, specified in the decree or instrument, shall not be considered periodic payments for the purposes of this subsection, unless such principal sum is to be paid within a period ending more than ten years from the date of the decree."

Respondent's contention is that the deductions claimed by Petitioner constitute installment payments of a principal sum which is specified in a decree. Therefore, they are not periodic payments required by Section 22(k).

The other issue involved, involving the claimed deduction of $4,750.00 for 1945, is whether or not the Petitioner sustained an ordinary loss under Section 23(e) (1) or (2), when certain literary rights and original manuscripts were [12] transferred.

Respondent maintains that it is a loss from a sale of a capital asset held for more than six months and therefore subject to the limitations of Section 117 (b) and (d), of the Internal Revenue Code.

Mr. Rosen: Your Honor please, we have agreed upon a stipulation of facts. Mr. McLane advises me that the stipulation will have to be signed by the acting chief counsel, as I understand, but that he is willing for it to be now introduced in evidence and that the signature of Mr. Leming be later supplied. Is that correct?

Mr. McLane: That is correct. Your Honor, I have no authority to sign the stipulation. Mr. Neblett says if approved by me it will be signed by him. It was presented a few moments ago.

The Court: The stipulation will be received provisionally, on condition that the Respondent obtain the signature of the appropriate authorized officer of the Bureau of Internal Revenue.

Mr. Rosen: I have your assurance that will be done?

Mr. McLane: It will be signed.

Mr. Rosen: The stipulation refers, your Honor, to a duplicate original of the written agreement settlement and separation entered into by Mr. and Mrs. Fidler on February 4, 1944, as Exhibit 1-A. I have not yet marked that. [13]

I now offer into evidence, pursuant to the stipulation, an agreement entered into between Petitioner James M. Fidler and Roberta L. Fidler, also known as Ruth L. Fidler. This agreement was entered into on the 4th day of February, 1944. I ask it be marked as Exhibit 1-A.

The Court: I notice from the stipulation that there are four exhibits, ranging from 1-A through 4-D.

Mr. Rosen: Yes.

The Court: Simply give those to the Clerk. He will give them the appropriate identifying symbols.

Mr. Rosen: Your Honor, with respect to Exhibit 4-D, which is a detailed list of the literary properties purchased by the Petitioner in the year 1937, the list runs approximately 30 pages. My secretary was able to get about 25 of the pages completed. I still have about five pages to be added. I would like the permission and agreement of counsel—I understand he will consent to that——

Mr. McLane: No objection.

Mr. Rosen: ——I might add to the exhibit the additional pages which are now in the process of being copied.

The Court: You may give them to the Clerk when they are finished.

Mr. Rosen: Thank you, sir. I would like to call Mr. Fidler. [14]

Whereupon,

JAMES MARION FIDLER

the Petitioner, called as a witness for and on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record.

The Witness: James Marion Fidler.

Direct Examination

By Mr. Rosen:

Q. Mr. Fidler, you are the Petitioner who appears herein, under the name of James M. Fidler? That is correct, is it not? A. Yes.

Mr. McLane: Excuse me, Mr. Rosen. No, never mind. Go ahead.

Q. (By Mr. Rosen): Mr. Fidler, in the stipulation of facts which counsel for the government has entered into with me, as your attorney, it is stated that "Petitioner paid to Ruth Law Fidler the sum of $800.00 each month during the period commencing April 1, 1944, and ending December 31, 1946," which is the period of time involved in this particular proceeding.

What did those payments represent, Mr. Fidler?

A. Alimony and support.

Q. For your wife, for your former wife? [15]

A. Yes.

Q. Now, Mr. Fidler, in the year 1937, did you acquire a stock of literary properties from one William N. Selig? A. Yes.

Q. Did you pay Mr. Selig any consideration therefor? A. Yes.

(Testimony of James Marion Fidler.)

Q. Do you know how much you paid to him?

A. $5,000.00.

Q. Can you refer to your check stubs and advise me the dates upon which that $5,000.00 was paid?

A. At the time that the Agreement was signed, to purchase it from Colonel Selig—Mr. Selig—I made a payment of $500.00 as a deposit against $5,000.00; leaving $4,500.00 due that was paid on July 26, 1937, by Check 6792.

Q. Did you thereafter make additional payments?

A. On August 2, 1937, I made another payment of $2,000.00 on account, leaving a balance of $2,500.00. My Check No. 6834.

On September 15, 1937, I paid Colonel Selig $2,500.00 in full for the Selig library; my Check No. 6991.

Q. Now, Mr. Fidler, at the time that you purchased this stock of literary properties, which the stipulation describes as consisting of 75 published novels and stage plays and approximately 2,000 original manuscripts and scenarios and motion picture shooting scripts, what was your [16] principal business or occupation?

A. I was a radio commentator and newspaper columnist.

Q. How and for what reason did you buy this stock of literary property?

A. I bought them because Mr. Bentel, who is an agent and has long been a friend of mine, came to

(Testimony of James Marion Fidler.)

me with the presentation of the idea that Colonel Selig, who was in failing health, was ready to sell some of his properties at what Mr. Bentel believed was quite a reasonable price, because among them were a number of properties he thought were quite good, which we, as a partnership, might be able to sell to studios and thereby earn a profit.

Q. Did you then, pursuant to Mr. Bentel's suggestion, buy the stock of properties from Colonel Selig? A. Yes.

Q. You mentioned something about a partnership. Actually, you didn't form a formal partnership?

Mr. McLane: Excuse me, your Honor. I object to the form of the question. I think that is a little too leading.

Mr. Rosen: I am sorry.

The Court: If you will, attempt not to lead the witness.

Mr. Rosen: All right. [17]

Q. (By Mr. Rosen): Mr. Fidler, you referred to a partnership. What sort of an understanding, or what was the sum and substance of your understanding with Mr. Bentel, with respect to his assistance to you in disposing or selling individual items from the stock of literary properties?

A. Mr. Bentel was to conduct a campaign to sell those stories, which he believed—or books or plays—which he believed were available to any or all studios on a basis that I was to receive back from the sale of any or some of the properties my

(Testimony of James Marion Fidler.)

investment. Therefore, we were to divide the returns fifty-fifty.

The Court: Was that understanding reflected in any written agreement between you?

The Witness: Not to my knowledge, sir. We were pretty long time friends.

Q. (By Mr. Rosen): Mr. Fidler, did you purchase any of these properties with the intent or purpose of using them in your work as a commentator or columnist? A. No.

Q. Do you know if Mr. Bentel, after you had purchased the properties, made efforts to sell various books and stories to some of the motion picture studios? A. Yes, we both did. [18]

Q. Were you successful in selling even a single book up to 1945, when you sold the stock?

A. No.

Q. You did have prospects, but were unable to make any sale? A. That is right.

Q. Now, in connection with this group of literary properties, Mr. Fidler, were there any physical objects, anything of a material nature, which were turned over to you at the time that Colonel Selig assigned the property to you? Did you receive books or manuscripts in the physical form?

A. Yes, there was quite a batch of them.

Q. These books and manuscripts, motion picture manuscripts—were there motion picture manuscripts also? A. Yes.

Q. Were those maintained by Mr. Bentel in his

(Testimony of James Marion Fidler.)

offices and place of business for purposes of display, Mr. Fidler, to prospective customers and persons who might be interested in buying individual manuscripts and stories?

A. A very careful tabulation was made of them and kept on file, and they themselves were on display in his offices.

Q. As I understand it, in 1945, to and including 1945, the date upon which you sold the entire stock, you had been unsuccessful in selling any book and you sold the entire [19] stock, everything which you had acquired from Mr. Selig, for the sum of $250.00 A. That is right.

Mr. Rosen: I have no further questions.

Mr. McLane: May I remain seated, with the Court's permission?

The Court: You may.

Cross-Examination

By Mr. McLane:

Q. Mr. Fidler, did you in 1943 hire an attorney in Los Angeles by the name of George Breslin, to work out a property settlement between the former Mrs. Fidler and yourself? A. No, I didn't.

Q. Did you pay him a fee of $1,350.00 for work performed for Mrs. Fidler? A. Yes, I did.

Q. Were the results of his work the Agreement dated August 20, 1943, between your former wife and yourself, which is now in evidence as part of the Stipulation? That was the first agreement, was it not? A. Yes.

(Testimony of James Marion Fidler.)

Q. Was that the result of his work?

A. Yes.

Q. Was that agreement canceled on February 4, 1944, [20] when an additional $7,000.00 was provided for in the February 4th agreement?

Mr. Rosen: Excuse me, Mr. McLane. Have you finished your question? I would like to interpose an objection.

Mr. McLane: Surely.

Mr. Rosen: I object to that, your Honor, on the ground that the document now in evidence, the Agreement of February 4, 1944, speaks for itself.

Mr. McLane: I withdraw the question.

Q. (By Mr. McLane): Was Mr. C. A. Eddy the attorney you hired in Nevada to represent you in the divorce proceeding brought by your former wife? A. Yes.

Q. Did you actually appear in the Nevada court during the divorce proceedings? A. No.

Q. Was Mrs. Fidler represented by different attorneys in that divorce proceeding in Nevada?

A. Yes.

Q. Do you remember who they were?

A. I believe—in fact, I know one was named Rawley, Paul Rawley, I believe. I don't know his partner's name.

Q. I hand you a copy of the original divorce decree filed on May 6, 1944, dated March 20, 1944, which is now in [21] evidence as a part of the Stipulation, Mr. Fidler, and I will ask you to turn to the next to the last paragraph and read it, please.

(Testimony of James Marion Fidler.)

A. You want me to read that aloud?

Q. Yes, please.

A. "It is further ordered, adjudged and decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said settlement agreement, the sum of $800.00 per month, commencing forthwith and continuing for a period of five years."

Q. Now I hand you a copy of the amended decree of divorce, dated March 20, 1944, and filed November 16, 1944, which is now in evidence as a part of the Stipulation, and I will ask you to read the last paragraph on the first page.

Mr. Rosen: Just a moment, please. I am going to object, your Honor. The document speaks for itself.

Mr. McLane: Your Honor, I am trying to get a little continuity in my question. I want to ask Mr. Fidler a question after these two paragraphs have been set forth.

Mr. Rosen: I see no reason to require Mr. Fidler to read the documents out loud, your Honor.

The Court: Well, it is a mere quibble. The document does speak for itself.

Mr. Rosen: Yes. [22]

The Court: If you care to you can direct Mr. Fidler's attention, and let him read it to himself.

Mr. McLane: I will withdraw the question.

Q. (By Mr. McLane): Read it to yourself, Mr. Fidler, for a second.

A. (Witness complies.)

Q. Is the effect of the second decree, Mr. Fidler,

(Testimony of James Marion Fidler.)
to provide that $300.00 a month would be contingent upon your being employed under a radio contract?

Mr. Rosen: Excuse me, please. I object to that, your Honor, as calling for a conclusion of the witness. That is one of the issues to be decided by the Court. The document speaks for itself.

The Court: The effect of this paragraph is a legal question, not one that turns on the testimony of this witness.

Mr. McLane: I withdraw the question, your Honor.

Q. (By Mr. McLane): Mr. Fidler, in view of the fact that the settlement agreement of February 4th was made a part of the original decree, why did you direct Mr. Eddy, your attorney, to petition for an amended decree, which was filed six months later?

Mr. Rosen: Just a moment. I am going to object to that, your Honor, on the ground there is nothing in [23] evidence to show that Mr. Fidler directed Mr. Eddy to apply for an amended decree.

Mr. McLane: I withdraw the question.

Q. (By Mr. McLane): Did you direct Mr. Eddy to apply for an amended decree of divorce?

A. I did not.

Q. Do you know who did?

A. Yes. Mr. Vincent Hickson. I don't know his initial. Vincent Hickson in Los Angeles.

Q. He was your attorney at the time?

A. Yes.

(Testimony of James Marion Fidler.)

Q. Was he your tax attorney?

A. They have tax offices. I have never had a tax attorney in that sense. I have an accountant.

Q. Did Mr. Glenn Braumfield, your tax advisor, suggest the advisability of your amended decree?

A. Well——

Mr. Rosen: Just a moment. I object to that, your Honor, as being wholly immaterial and irrelevant to the issues involved. Certainly, the parties had a right, under the advice of counsel, to set up their agreement in such form as they saw fit.

The Court: What is the purpose of the question, Mr. McLane? [24]

Mr. McLane: Your Honor, I was trying to find out why the decree was amended. There is a change in the wording of the original decree, as compared to the amended decree.

The Court: Well, there is more than a change in the wording, it seems to me.

Mr. McLane: There is a change in substance.

The Court: The original decree provided for a flat sum of $800.00 a month, whereas the——

Mr. McLane: For five years.

The Court: For five years. Whereas, the amended decree not only speaks of the $800.00 a month, but provides for scaling it down by $300.00 in specified circumstances. Perhaps that was all incorporated by reference in the original decree; I don't know. The original decree referred by reference to the original agreement.

(Testimony of James Marion Fidler.)

Mr. Rosen: That is correct, your Honor.

The Court: I don't quite see what you are driving at, Mr. McLane.

Mr. McLane: I am not sure yet, your Honor, that the amended decree was filed after notice had been given to the Petitioner's spouse. I am trying to find out whether this decree was filed upon petition of Mr. Fidler's counsel only, and whether or not thought was given to his former wife at the time the decree was issued. This is a decree of [25] divorce, and I am wondering——

The Court: Are you suggesting the possibility that it may be collaterally attacked for that reason?

Mr. McLane: No. I am wondering, your Honor, whether or not the amended decree of divorce is a valid decree insofar as the Commissioner of Internal Revenue is concerned, unless it is shown by taxpayer Petitioner in this case that the second decree, that is, the amended decree, was filed pursuant to petition by both taxpayer and his former wife.

It seems to me that the second decree modifies the right of former Mrs. Fidler.

Mr. Rosen: Mr. McLane, I might shorten this somewhat by stating to you that under my questioning of Mr. Fidler he has no knowledge whatsoever, no personal knowledge whatsoever of what transpired in the Nevada action. I don't think he could help you on that. If you want to pursue it, I have no objection.

Q. (By Mr. McLane): Then I will ask the

(Testimony of James Marion Fidler.)

question again, Mr. Fidler. Do you know whether your wife was represented in the Nevada proceeding at the time the amended decree was petitioned for? A. No, I do not.

Q. During 1944, 1945 and 1946, were you employed as a radio commentator? A. Yes. [26]

Q. During all of each year? A. Yes.

Q. Were you so employed prior to 1944?

A. The question is a little ambiguous. Part time I was and part time I wasn't.

Q. Which part of the years——

A. It would be difficult to find dates. There was a period, for example, about 1940, '41, '42, in which I was not employed at all on radio. My contract with one company ran out and I got no contract.

Q. What was the main source of your income during those years? A. Newspaper column.

Q. Prior to 1941, were you on the radio?

A. Yes.

Q. For how many years?

A. About eight years. In a sense, the first couple of years of that were, I suppose you would call, apprenticeship. I worked without salary, to become established.

Q. So from about 1933 to 1941 you were continuously employed as a radio commentator?

A. No, not continuously. There were periods when I started—You asked about when I started in 1933?

Q. During that period of 1933 to 1941, how

(Testimony of James Marion Fidler.)

many years were you employed as a radio [27] commentator? A. I don't know.

Q. How about 1937?

A. I believe I was employed—you are asking me questions that I am not positive of, but I had a contract with Proctor & Gamble for several years. That contract ended and I worked for a short period for a company named Tayton, that went broke during the war.

I don't remember what year later on I signed with the Carter company. Prior to my contract with Proctor & Gamble, I had worked for a short period for Luden's Cough Drops, and prior to that——

Q. Let's take it year by year.

A. I can't tell you year by year; they don't go by years.

Q. During 1937 were you employed as a radio commentator? A. I am quite sure I was.

Q. Were you also employed as a newspaper columnist during 1937? A. Yes.

Q. How about 1938? A. Yes.

Q. '39? A. Yes, I think so.

Q. 1940? [28]

A. To my recollection, yes. Somewhere in that period my contract ran out and I did not work for quite a while.

Q. During those years was the main source of your income derived from your radio program and your newspaper column?

A. Radio, I would say. Newspaper was comparatively small.

(Testimony of James Marion Fidler.)

Q. I hand you a copy of a quitclaim deed, which is now in evidence as a part of the Stipulation, Mr. Fidler, and ask you to examine it briefly.

A. You say examine it. Do you want me to read it?

Q. Just look it over rather briefly.

The Court: What part of the Stipulation are you referring to?

Mr. McLane: I don't know the number of that. They weren't numbered.

Mr. Rosen: The quitclaim deed, I believe, Mr. McLane, is attached as Exhibit D to the property settlement agreement now in evidence as Exhibit 1-A. It is clipped to that document.

The Court: An exhibit to an exhibit.

Mr. Rosen: Yes, your Honor.

Mr. McLane: I do not have them numbered.

Mr. Rosen: I might make this statement, with Mr. McLane's consent: In the final agreement of February 4, [29] 1944, each of the previous agreements entered into between the parties were attached as exhibits for the purpose of bringing the entire thing into the form of one document, your Honor.

Q. (By Mr. McLane): Mr. Fidler, what was the fair market value of the first piece of property listed in that quitclaim deed as of August 20, 1943?

A. I haven't the slightest idea.

Mr. Rosen: I object to that as being incompe-

(Testimony of James Marion Fidler.)

tent and irrelevant; not bearing on the issues in this case.

Mr. McLane: I am trying to find out, your Honor, whether or not the property settlement as of August 20, 1943, which is later incorporated in the February 4, 1944, agreement, isn't, in effect, simply a property settlement, pure and simple, and whether or not the government is bound by the characterization of the payments under the promissory notes, as alimony, since the government wasn't a party to the agreement and is not bound by the parol evidence rule. However, if Mr. Fidler can't make any kind of an estimate——

The Court: The witness has already answered he doesn't know.

Q. (By Mr. McLane): Well now, Mr. Fidler, isn't it a fact that each of the pieces of real estate described in that deed were [30] community property and owned by Mrs. Roberta Fidler and yourself? A. No.

Q. Why did you have her sign a quitclaim deed?

A. I didn't prepare the quitclaim deed. This was prepared by an attorney. I don't know the whys or wherefores. I say my no rather broadly. I am of the opinion these pieces of property—this is a long time that you are taking me back—are the house in which we lived and which I had owned since 1930 or '31. I am only guessing at part of that.

Q. Will you turn, Mr. Fidler, to the February 4, 1944, agreement, which is in evidence now as a part of the Stipulation, as Exhibit 1-A, and turn

(Testimony of James Marion Fidler.)

to page 9 of the February 4th agreement between yourself and Mrs. Fidler, and to the eighth paragraph? Will you examine that paragraph briefly?

A. Just that one or——

Q. Just that one paragraph. Can you tell me upon whose advice that paragraph was inserted in the agreement? Was that the advice of Mr.—What was your attorney's name?

Mr. Rosen: To which I object as being wholly incompetent and irrelevant. I don't see where it has any bearing on the issues involved in this case. I think all counsel know that attorneys who represent parties in proceedings of this kind ordinarily insert such provisions and are [31] necessary and advisable for the protection of the rights of their clients, as well as to express the agreement the parties are reaching themselves in the matter.

The Court: What is the purpose?

Mr. McLane: I am trying to find out who was the counsel for Mr. Fidler at the time the February 4th agreement was drawn up and who was the counsel for Mrs. Fidler at that time and who paid the fees of both of them.

Mr. Rosen: I will advise you of that fact.

Mr. McLane: All right.

Mr. Rosen: In the agreement itself, Mr. McLane, if you will note on page 17, it bears the signature—the duplicate original now in evidence as Exhibit 1-A bears the signature of Vincent C. Hickson, as attorney for James M. Fidler, and Mr. Jerry Geisler as attorney for Mr. Fidler's wife.

(Testimony of James Marion Fidler.)

Mr. McLane: The agreement provides that Mr. Fidler paid the fee of Mr. Geisler.

Mr. Rosen: That happens to be the standard practice and custom in this locality.

Q. (By Mr. McLane): Now, Mr. Fidler, you testified, I believe, that in 1937 you acquired certain manuscripts and literary properties from a Mr. Selig. Do you keep any canceled checks?

A. I don't believe I have any canceled checks. I [32] keep them until they are outlawed, as it were. I do keep my stubs.

Q. Did you get a bill of sale for the property which you purchased from Mr. Selig?

A. I would presume so; I haven't got it.

Q. You don't have it in court? A. No.

Q. Now, at the time that you purchased the property rights in 1937, you were a radio commentator and newspaper columnist? A. Yes.

Q. Did you ever use any of the materials in any of these magazine story manuscripts in your column or for a manuscript on your radio program?

A. No.

Q. You testified, I believe, that certain prospects were approached regarding the sale of these literary properties. Can you name a few?

A. I don't know that I could specify with stories, to which studios. There were several stories involved, several books involved, and some of them were hot and some were cold. One in particular that was hot, that we thought was sold, was a book

(Testimony of James Marion Fidler.)

called "Under Two Flags." I believe that was the title.

The book called "Under Two Flags," Mr. Bentel and [33] I both believed that the sale—and I think the sale was to have been to RKO, we both believed the sale was in the bag. About that time another studio made a motion picture, which they titled "Under Two Flags," and it kayoed, or whatever you want to call it—it stopped our sale.

We tried to take action to preserve our title, but were unable to.

Q. Did you ever sell a story or manuscript to any studio or any individual prior to 1937?

A. I don't believe I ever sold anything of any sort to any studio, except my personal services and acting.

Q. Either before or after 1937?

A. I don't know about before 1937. I have been in Hollywood since 1919, connected with the motion picture business.

Q. This is the only sale of any stories or manuscripts you have ever participated in, is that correct?

A. To my knowledge, that is correct.

Mr. McLane: No further questions, your Honor.

Mr. Rosen: Your Honor please, I have no further questions of Mr. Fidler. Just one moment, please.

Mr. McLane, if you desire, for reference or utilization in the trial of this action, what purports to be a copy of the assignment from Mr. Selig to Mr.

(Testimony of James Marion Fidler.)

Fidler—I cannot vouch for its veracity, however. For that reason I [34] haven't introduced it in evidence. We don't have the original. It is a copy. If you would like to refer to it and use it, you may do so.

Mr. McLane: I will just do so. Just one further question, your Honor, if I may.

Q. (By Mr. McLane): Whom did you sell the stories and manuscripts to, Mr. Fidler?

A. Eric Ergenbright.

Mr. McLane: That is all.

(Witness excused.)

Mr. Rosen: The only other witness I had in mind calling was Mr. Bentel. Unfortunately, I was unable to reach him during the noon recess, during the two-hour recess, when I was notified the case would be heard this afternoon.

If I may confer with Mr. McLane a moment, perhaps we might stipulate as to the effect of his testimony and thereby expedite this matter. May I have a moment with which to confer with Mr. McLane?

The Court: We will have a recess at this time.

(Short recess taken.)

Mr. McLane: May I call Mr. Fidler as my witness, to ask one further question, please?

The Court: Yes. [35]

Whereupon,

JAMES MARION FIDLER

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McLane:

Q. Mr. Fidler, is Mr. Ergenbright an employee of yours, or was he at the time you sold the manuscripts, and so forth, to him? A. Yes.

Q. How long had he worked for you?

A. Without referring to records, I wouldn't be able to say. He has worked for me a number of years.

Mr. McLane: That is all.

Mr. Rosen: I have no questions, your Honor.

(Witness excused.)

Mr. Rosen: The Court please, we have one additional witness only at this time, a Mr. Bentel, the literary property broker, whose name has been referred to in the testimony.

I have been attempting to contact him since about 12:00 o'clock noon today. I have been unable to reach him. His testimony should take only five or ten minutes.

I wondered if the Court could accommodate us by [36] permitting us to contact him and bring him in in the morning for about ten minutes, and put on his testimony.

Mr. McLane: No objection, your Honor.

Mr. Rosen: Do you have any objection to that?

Mr. McLane: None whatsoever.

The Court: Very well, I will keep the proceedings open until tomorrow morning.

Mr. Rosen: Thank you, sir.

The Court: Can you be ready to begin at a quarter to 10:00?

Mr. Rosen: I will do my utmost, if I can contact the gentleman this afternoon. For some reason or other I have been unable to reach him at his office.

I should like to ask of the Court, in the event I can't contact him this afternoon or evening, would you like for me to advise you prior to tomorrow morning?

The Court: Well, I will be here tomorrow morning. We will call this case at 9:45.

Mr. McLane: While Mr. Fidler is still on the stand, before we start again tomorrow, may I have these income tax returns identified and offered in evidence, out of order?

Mr. Rosen: I have no objection. [37]

Whereupon,

JAMES MARION FIDLER

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McLane:

Q. Will you examine the income tax return I hand you, Mr. Fidler, for the year 1944, and tell the Court whether or not that is your signature at

(Testimony of James Marion Fidler.)

the bottom of the first page? A. Yes, it is.

Mr. McLane: Now I offer in evidence as Respondent's Exhibit E, an income tax return for the year 1944, for the Petitioner James M. Fidler.

Will you agree, Mr. Rosen, these are authentic returns?

Mr. Rosen: I haven't had an opportunity to look at them yet. If you will permit me to, I will glance at them.

Mr. McLane: Yes.

Mr. Rosen: I will concede that those are the returns filed by the Petitioner.

Mr. McLane: I now offer as Respondent's Exhibit next in order the income tax returns for 1944, 1945 and 1946 for the Petitioner James M. Fidler, and ask the Court leave [38] to withdraw them and have them photostated and returned to the record.

The Court: I have already received the returns for 1944. I will receive in evidence the returns for 1945 and 1946.

The Clerk: Respondent's Exhibits F and G.

(The documents above referred to were received in evidence and marked Respondent's Exhibits E, F and G.)

The Court: Counsel has permission to withdraw the returns, for the purpose of photostating.

Mr. McLane: Thank you, your Honor.

(Witness excused.)

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Rosen: As I understand, your Honor, then we will reconvene at 9:45 in the morning?

The Court: 9:45.

Mr. Rosen: Thank you, sir. May Mr. Fidler be excused?

Mr. McLane: Yes.

The Court: Yes, he may be excused.

(Whereupon, at 3:25 o'clock p.m., an adjournment was taken until 9:45 o'clock a.m., Wednesday, February 6, 1952.) [39]

February 6, 1952

The Clerk: Docket No. 27910, James M. Fidler.

Mr. Rosen: It has been agreed with the Petitioner and the Respondent that the document now in evidence as Exhibit No. 1-A may be withdrawn and in lieu thereof a conformed typewritten copy of said document may be introduced as Exhibit 1-A. Is that agreeable?

Mr. McLane: No objections.

The Court: You may substitute the copy for the original which has been previously lodged with the Clerk.

Mr. Rosen: In my opening statement I indicated to the Court that I was relying, in support of the Petitioner's position with respect to the deductibility of alimony payments involved herein, upon two cases. I referred to one as the Keith case. I should like to correct that. The proper title of

this case is Roland Keith Young, petitioner, vs. Commissioner of Internal Revenue, reported in 10TC724. The other case to which I made reference was John H. Lee, petitioner, vs. Commissioner of Internal Revenue, 10TC834.

If your Honor please, Mr. Bentel, the witness whose testimony I should like to introduce in connection with the capital assets or ordinary loss transactions involved in this matter, is presently ill, and I should like to move the Court to permit me to introduce his testimony one week from today at 9:45 a.m. [42]

The Court: The clerk will call this case next Wednesday morning at 9:45 a.m.

Mr. Rosen: I have nothing further to present at this time.

Mr. McLane: I have nothing, your Honor.

(Whereupon, at 10:30 o'clock a.m., an adjournment was taken until 9:45 o'clock a.m., Wednesday, February 13, 1952.) [43]

February 13, 1952

The Clerk: Docket No. 27910, James M. Fidler.

Mr. Rosen: Your Honor please, in this matter, during the testimony of Mr. Fidler last week, some question was raised concerning whether or not his wife had knowledge of the amendment of the divorce decree.

Since that time I have succeeded in my efforts to locate certain correspondence which passed be-

tween her attorneys and Mr. Fidler's attorney here in Los Angeles. I have exhibited that correspondence to opposing counsel and we have entered into a supplemental stipulation of facts, which I would like to file at this time, and I should also like to introduce as Petitioner's Exhibits 5 through 12, both inclusive, certain letters attached to the Stipulation.

The Court: The Stipulation and accompanying exhibits will be received.

Mr. Rosen: The Court kindly continued this matter until this morning, to enable the Petitioner to offer the testimony of one Mr. Bentel, who was ill last week.

I am sorry to state Mr. Bentel's illness has apparently become worse. He is now in the hospital and unable to appear today.

Counsel for the government has agreed, subject to the Court's approval, that Petitioner may now rest its case, with the understanding that if the deposition of Mr. [46] Bentel may be taken between the present date and the dates for filing of briefs in this matter, we would be permitted to file his deposition with the Court. I don't want to hold the case open, your Honor. I would like to submit the case at this time, with that understanding, if agreeable with the Court.

The Court: The Court will receive the deposition of that witness within the next 45 days.

Mr. Rosen: Thank you, sir.

The Court: You rest?

Mr. Rosen: Yes, with that understanding, your Honor, I am prepared to rest, and do rest.

Mr. McLane: The Respondent rests, your Honor.

The Court: Very well. The case is submitted subject only to the receipt of the deposition. Petitioner's brief will be due in 45 days.

Mr. McLane: Excuse me. May we have briefs under the rules, simultaneous briefs, in this case?

The Court: In view of the fact that all of the facts have not been stipulated, I prefer consecutive rather than simultaneous briefs.

Respondent's brief will be due 30 days after Petitioner's. Petitioner may reply 20 days after receipt of Respondent's brief.

Mr. Rosen: Thank you.

(Whereupon, at 10:20 o'clock a.m., Wednesday, February 13, 1952, the hearing in the above-entitled matter was closed.)

Filed March 3, 1952, T.C.U.S. [47]

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

The parties to this proceeding, through their respective counsel of record, hereby stipulate that the following facts are true and may be found as facts by the court, subject to the right of either party to enter objections on the grounds of relevancy or materiality, and the right of either party to present other items of proof, either related or

unrelated to the facts herein stated but not inconsistent therewith:

I.

The petitioner is an individual whose present mailing address is 1759 N. Gower Street, Los Angeles 28, California. The returns for the years here involved were filed with the Collector of Internal Revenue for the Sixth District of California, Los Angeles, California.

II.

The taxes in controversy are income tax for the calendar year 1944 in the amount of $7,316.60, income tax for the calendar year 1945 in the amount of $10,293.79, and income tax for the calendar year 1946 in the amount of $6,992.74.

III.

Petitioner and Ruth Law Fidler were married on or about February 20, 1936. Ruth Law Fidler was also known as and used the names "Roberta Law Fidler" and "Roberta L. Fidler," and wherever the names "Ruth Law Fidler," "Roberta Law Fidler," and "Robert L. Fidler" appear in this proceeding, such names refer to one and the same person.

IV.

Following the marriage between petitioner and Ruth Law Fidler in 1936 and prior to February 4, 1944, unhappy differences arose between petitioner and said Ruth Law Fidler, and they commenced to live separate and apart from one another.

V.

On February 4, 1944, petitioner and said Ruth Law Fidler, under the name of Roberta L. Fidler, executed a written agreement of settlement and separation. A duplicate original of said written agreement of settlement and separation is hereto attached, marked "Exhibit 1-A," and made a part hereof by reference as if herein fully set forth.

VI.

In 1944, Ruth Law Fidler, as plaintiff, instituted an action in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, against petitioner as defendant, wherein said Ruth Law Fidler prayed that she be granted a decree of divorce from the petitioner and that the agreement of settlement and separation aforesaid be approved by the court. Said action appears in the records of said court as Case No. 4771.

VII.

Said divorce action was tried in said court on March 20, 1944, and a decree of divorce was rendered in favor of said Ruth Law Fidler and against petitioner. Thereafter, on May 6, 1944, there was filed in said court a formal decree of divorce, a true and correct copy of which is hereto attached, marked Exhibit "2-B," and made a part hereof by reference.

VIII.

Thereafter, on September 18, 1944, upon application of Clarence A. Eddy, attorney for petitioner

in said action, the court ordered that the decree of divorce be amended to recite correctly the terms and provisions of the agreement of settlement between Ruth Law Fidler and petitioner, and on November 16, 1944, there was filed in said court an amended decree of divorce, a true and correct copy of which is hereto attached, marked Exhibit "3-C," and made a part hereof by reference.

IX.

That petitioner is the defendant referred to in said decree, and Ruth Law Fidler is the plaintiff referred to therein; that the written agreement of settlement and separation, a duplicate original of which is attached hereto and marked Exhibit "1-A," is the Settlement Agreement referred to in said decree.

X.

Said decree, as amended, remained in full force and effect during the years 1945 and 1946.

XI.

That on and prior to March 20, 1944, petitioner had paid, transferred and assigned to Ruth Law Fidler all monies and properties due to Ruth Law Fidler under the terms of said agreement of settlement and separation, and had paid all monies required to be paid to her attorneys, and had made all payments to her which had become due and payable to her pursuant to the terms of the promissory notes referred to and described in said agreement. That subsequent to March 20, 1944, and to

and including December 31, 1946, petitioner made payment to Ruth Law Fidler of all sums which he was obligated to pay to her for the care, support and maintenance of the minor child of the parties, under the terms of said agreement and decree. That in addition to the foregoing, petitioner pursuant to the terms of said agreement and decree paid to Ruth Law Fidler the sum of $800.00 each month during the period commencing April 1, 1944, and ending December 31, 1946.

XII.

That on February 4, 1944, and on March 20, 1944, petitioner's principal business was that of a radio commentator and reporter; that the "radio contract" referred to in the agreement and amended decree was a contract which was in force on February 4, 1944, and March 20, 1944, between petitioner and the sponsor of a weekly radio broadcast program under which petitioner was engaged to and had agreed to render his services as a commentator and reporter on said weekly radio program; that the term of said radio contract was twenty-six weeks, subject to the option of the sponsor to renew and extend said contract of employment for additional, successive terms of twenty-six weeks duration. That during the period from February 4, 1944, to December 31, 1946, said sponsor exercised its option to renew and extend said contract with petitioner, and petitioner remained continuously employed by said sponsor during said period. That during said period, petitioner received under said

contract and the renewals and extensions thereof a monthly sum equal to the monthly sum which he was receiving under said radio contract on February 4 and March 20, 1944.

XIII.

On July 31, 1937, one William N. Selig assigned and transferred to petitioner all of said Selig's literary rights, motion picture rights and other property rights, of every kind and nature, in and to approximately seventy-five published novels and stage plays, and approximately two thousand original manuscripts, scenarios, and motion picture shooting scripts. In the calendar year 1945, petitioner sold all of the rights, titles and interests which he had acquired from said William N. Selig, as aforesaid, for the sum of $250.00. An itemized list of the literary properties referred to in this paragraph, describing said properties by title, author, and nature, is hereto attached and marked Exhibit 4-D.

Dated this 5th day of February, 1952.

RAYMOND C. SANDLER, and
NELSON ROSEN,

By /s/ NELSON ROSEN,
Attorneys for Petitioner.

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

JOINT EXHIBIT No. 1-A

Agreement

This Agreement, made and entered into this 4th day of February, 1944, by and between James M. Fidler, hereinafter designated as "First Party," and Roberta L. Fidler, hereinafter designated as "Second Party,"

Witnesseth:

Whereas, the parties hereto intermarried on or about February 20, 1936; and

Whereas, there is no issue of said marriage; however, the parties hereto, on or about May 10, 1942, legally adopted a female child, born on or about May 8, 1942, which said child is named Bobbe Fidler, Jr.; and

Whereas, unhappy differences have arisen between the parties hereto, and a separation has already occurred between them and they are now living separate and apart; and

Whereas, on August 20, 1943, the parties hereto did enter into an Agreement, a copy of which is attached hereto, marked "Exhibit A," and referred to for greater particulars; and on October 21, 1943, did amend said Agreement (Exhibit A) by an instrument in writing entitled "Amendment to Agreement of August 20, 1943," a copy of which is attached hereto, marked "Exhibit B," and referred to for greater particulars; and on December 16, 1943, did further amend and supplement said Agreement (Exhibit A) by an instrument in writing en-

Joint Exhibit No. 1-A—(Continued)

titled "Agreement," a copy of which is attached hereto, marked "Exhibit C," and referred to for greater particulars; and

Whereas, the parties hereto are desirous of canceling said Agreements (Exhibits A, B and C) and of entering into a new Agreement which shall settle and forever adjust and determine their respective rights and interests in and to any property now owned or that may hereafter be owned or acquired by them, or either of them, and of the right of either to inherit from the other, the right of either to maintenance and/or support from the other, the right of either to attorneys' fees and/or costs of suit in any action now pending or that may be commenced hereafter, the right of either to any family, widow's or other allowance of either from the estate of the other, the right of either to declare a homestead out of the property of the other, or out of any joint or any community property, the right of either to administer upon the estate of the other, and the rights, claims or demands that either may have in the property of the other or against the other while living, or against the estate of the other, and as set forth hereafter,

Now, Therefore, for an in consideration of the premises and the covenants, agreements and stipulations hereinafter set forth, it is hereby mutually agreed by and between the parties hereto as follows:

Joint Exhibit No. 1-A—(Continued)

First: That First Party has heretofore transferred and conveyed unto Second Party, as and for her separate property and estate, the property described in Paragraph 1 of said Agreement (Exhibit A), receipt of which is hereby acknowledged by Second Party; and has executed and delivered unto Second Party two (2) certain promissory notes, in words and figures, as set forth in Section A of Paragraph 2 of said Agreement (Exhibit A), and in Section B of Paragraph First of Amendment to Agreement of August 20, 1943 (Exhibit B), receipt of which is hereby acknowledged by Second Party, which property and notes Second Party will retain as part consideration for the execution of this Agreement; and has paid counsel fees as is provided in Paragraph 3 of said Agreement (Exhibit A); and has fully performed all of the other terms, conditions and provisions of said Agreements (Exhibits A, B and C) which he was required to perform, to the date hereof.

Second: That Second Party has heretofore transferred and conveyed unto First Party, as his sole and separate property, all her right, title and interest in and to all the property, real and/or personal, now in the possession and under the control of First Party, and in particular, all of her right, title and interest in and to the real property in the County of Los Angeles, State of California, which is more specifically listed and described in Quitclaim Deed, a copy of which is attached hereto,

Joint Exhibit No. 1-A—(Continued)

marked "Exhibit D," receipt of which is hereby acknowledged by First Party, which property First Party will retain as part consideration for the execution of this Agreement; and has fully performed all of the other terms, conditions and provisions of said Agreements (Exhibits A, B and C) which she was required to perform, to the date hereof.

Third: That said Agreement (Exhibit A), and said Amendment to Agreement of August 20, 1943 (Exhibit B), and said Agreement (Exhibit C), are hereby mutually cancelled and set aside, and that the terms, conditions and provisions of each of said Agreements shall have no further force or effect from and after the date hereof.

Fourth: That Second Party does hereby acknowledge that all installment payments which have become due and payable under those two (2) certain promissory notes, which are described in words and figures in Paragraph First of Amendment to Agreement of August 20, 1943 (Exhibit B), have been fully paid, and Second party instead of cancelling and delivering up to First Party the said two (2) promissory notes, retains the same, as part consideration for the execution of this Agreement.

Fifth: That the following terms, provisions and conditions hereof shall supplant all terms, conditions and provisions of the cancelled Agreements (Exhibits A, B and C) from and after the date hereof.

Joint Exhibit No. 1-A—(Continued)

Sixth: That First Party does hereby again assign, transfer and convey unto Second Party as and for her separate property and estate, the following-described property, being the same property described in Paragraph 1 of said Agreement (Exhibit A), to wit:

(a) That certain 1940 Packard 6 Coupe automobile, Engine No. C40203;

(b) Cash in the sum of Twenty Thousand ($20,000.00) Dollars, and/or part cash and part securities consisting of listed stocks or bonds of the equivalent reasonable market value, as of August 20, 1943, of said sum of Twenty Thousand ($20,000.00) Dollars.

That First Party agrees to assign, transfer and convey unto Second Party as and for her separate property and estate, and he does hereby so assign, transfer and convey unto Second Party, for the aforesaid purpose, and as further consideration to Second Party for the execution of this Agreement, the following-described property, to wit:

Cash in the sum of $7,000.00, and/or part cash and part securities consisting of listed stocks or bonds of the equivalent reasonable present market value of said sum of $7,000.00.

Second Party acknowledges that she has now received cash and/or securities in the total amount of $27,000.00, and said Packard automobile, as her

Joint Exhibit No. 1-A—(Continued)

share of a full and final division of property of the parties hereto.

That Second Party accepts said assignment, transfer and conveyance of said property upon the following conditions:

(a) In full payment, satisfaction and discharge of all right, title and interest, claims and demands of any and every character of the Second Party in or to any money, property, property rights, or thing of value, now or hereafter owned or acquired by the First Party;

(b) In full payment, satisfaction, discharge, settlement and release of all claims, demands and liability of every name, nature, character, kind or description against the First Party which the Second Party can, shall or may have by reason of any matter, thing or cause whatsoever, from the beginning of the world to the date hereof, save and except such as created under and by virtue of the terms of this Agreement;

(c) Said release extends to all claims of every nature or kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

That each of the parties hereto will be given the immediate and exclusive possession and control of any and all of the respective properties owned by them, or herein agreed to be given to them, respec-

Joint Exhibit No. 1-A—(Continued)

tively, and neither will, without the consent of the other, go upon the property of the other, or go in or upon the business property of the other, and will at no time either enter or molest the other in either the home or abode of the other, or enter or molest the other or interfere with the other in any manner in the place of business of the other.

Seventh: In addition to the foregoing, and on account of full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party does hereby redeliver to Second Party, and Second Party will retain, those two (2) certain promissory notes, being the same notes described in Paragraph First of Amendment to Agreement of August 20, 1943 (Exhibit B), in words and figures as follows, to wit:

"Los Angeles, California,
"August 20, 1943.

"(A) $18,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, or order, at Los Angeles, California, the sum of Eighteen Thousand ($18,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the date hereof, any default in the payment of any

Joint Exhibit No. 1-A—(Continued)

installment when due shall cause the whole of said note to become immediately due and payable at the option of the holder hereof. Should suit be commenced to enforce the payment of this note, I promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"/s/ JAMES M. FIDLER,
"4362 N. Clybourne Avenue,
"Burbank, California."

"Los Angeles, California,
"October 21, 1943.

"(B) $12,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only, at Los Angeles, California, the sum of Twelve Thousand ($12,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of September, 1946, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as

Joint Exhibit No. 1-A—(Continued)

the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"/s/ JAMES M. FIDLER,
"4362 Clybourne Avenue,
"Burbank, California."

In addition to the foregoing and in full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party will, upon the execution of the within instrument, make, execute and deliver unto Second Party one (1) promissory note, in words and figures as follows, to wit:

"Los Angeles, California,
"February 4, 1944.

"$16,200.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only, at Los Angeles, California, the sum of Sixteen Thousand, Two Hundred ($16,200.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Three Hundred ($300.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of March, 1944, and any default in the payment of any installment when due shall cause the whole note to become immediately

Joint Exhibit No. 1-A—(Continued)

due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, on account of the support and maintenance of the payee. Should payor, at any time during the term hereof, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, the monthly installments falling due hereunder during said periods shall be reduced in proportion to the amount of the reduction of his present radio contract, and should payor have no radio contract at all, then all monthly installments falling due hereunder during said period, shall be waived by payee, and payor shall not be required at any future time to pay the balance of any reduced, or waived payments, hereunder.

"/s/ JAMES M. FIDLER,
"4362 Clybourne Avenue,
"Burbank, California."

That Second Party accepts said three (3) promissory notes, for her support and maintenance and not

Joint Exhibit No. 1-A—(Continued)

in lieu of property rights, upon the following conditions:

(a) In lieu of other provision for the support and maintenance of Second Party during her natural life;

(b) In full payment, discharge and satisfaction of all obligations or any thereof, on the part of First Party to maintain or support Second Party during her natural life;

(c) In full payment, discharge and satisfaction of counsel fees and costs in any pending or future action between the parties hereto, other than an action on said or any of said promissory notes.

Eighth: That the installment payments provided in the three (3) promissory notes hereinabove set forth, being taxable to her as income, Second Party will, from and after the date hereof, file such income tax returns and/or declarations, both Federal and State, as are required by law, and will include therein all such support and maintenance payments received by her, and will pay all taxes shown to be due and payable under such returns and/or declarations.

Should any of the monthly installments provided for in the said $16,200.00 promissory note, last above described, be reduced or waived and the payor not be required to make same, First Party will give to Second Party, not for her support and maintenance,

Joint Exhibit No. 1-A—(Continued)

but as an absolute gift without condition, sufficient moneys to enable Second Party to pay her income taxes, both Federal and State, when due, on support and maintenance payments received from First Party, but not on income received by Second Party in excess thereof, without resort to the support and maintenance payments provided for in the two other promissory notes, above described, it being the intention of the parties hereto that Second Party will, during any period that the payments under said promissory note last above described are reduced or waived, have a net minimum sum of $500.00 per month for her support and maintenance.

Ninth: That until otherwise changed by the written mutual consent of the parties hereto, or by order of a court of competent jurisdiction, after notice to both parties and after a hearing in regard to the custody or guardianship of said minor child, the custody of said minor child shall be, and is hereby determined, as follows:

(a) First Party shall have the exclusive custody and control of said minor child from the first day of April to the last day of September of each and every year, during the minority of said minor child. That is to say, that First Party shall have exclusive custody and control of said minor child for a period of six (6) months, beginning on the first day of April, of each and every year hereafter;

(b) Second Party shall have the exclusive cus-

Joint Exhibit No. 1-A—(Continued)

tody and control of said minor child from the first day of October of each year to the last day of March of each following year, during the minority of said minor child. That is to say, that Second Party shall have exclusive custody and control of said minor child for a period of six (6) months, beginning on the first day of October of each and every year hereafter.

That neither party will take or remove said minor child from the State of California without court order, or without the written permission and consent of the other party, first had and obtained. Should the home or place of abode of either party be outside of the State of California, at any time subsequent hereto, no such court order or written permission or consent shall be required to take said minor child to such home or place of abode.

That at all times that either party hereto has the custody and control of said minor child, the other party shall have the right to see and visit said minor child at all reasonable times, at the home of the other party, or at such other places as shall be mutually agreed upon. Either party may, with the consent of the other party, take said minor child to his or her home or place of abode, upon reasonable occasions.

That neither party will influence or attempt to influence the said minor child in its affections or regard to the other party.

Joint Exhibit No. 1-A—(Continued)

Tenth: First Party, during the minority of said minor child, or until the parties hereto, in writing, do by mutual consent, change or modify this Agreement in this regard, agrees to pay to Second Party, as and for the care, support and maintenance of said minor child during the period that Second Party shall have the custody and control of said minor child, the sum of $200.00 per month, said payments to be made on the first day of each and every month during said period, commencing March 1, 1944.

Eleventh: That Second Party agrees to pay for all ordinary medical care and attention, and for all ordinary medical services, rendered to said minor child during any period she has the custody and control of said minor child. First Party agrees to pay for all extraordinary medical care and attention, and for all extraordinary hospitalization and medical services, rendered to said minor child during any period that either of the parties hereto have the care and custody of said minor child. Unless said minor child shall be continuously under doctors' care and is required to be hospitalized, or to remain at home in bed for a continuous period of at least five (5) days, such medical care and attention shall constitute ordinary medical care and attention, and First Party shall not be required to pay for the same. The parties hereto shall be obligated to pay for such medical care and attention, as above set forth, during the minority of said minor child, or until the

Joint Exhibit No. 1-A—(Continued)

parties hereto, in writing, do by mutual consent, change or alter this Agreement in this regard.

Twelfth: That First Party will pay to Jerry Giesler, 412 Chester Williams Building, 215 West 5th Street, Los Angeles, California, attorney for Second Party, the sum of $1,000.00 cash, for and in payment of the fees of said Jerry Giesler, as attorney for Second Party, and the said sum of money shall be paid concurrently with the execution of this Agreement, and the receipt thereof is hereby acknowledged.

Thirteenth: That Second Party conveys, transfers and assigns to First Party, as his sole and separate property, all her right, title and interest in and to all the property, real and/or personal, now owned or in the possession and under the control of First Party, and in particular, all of the real property set forth and listed in the Quit Claim Deed attached hereto, marked "Exhibit D," and as though the same were fully set forth and described at this point, and any and all of said property is and shall be the sole and separate property of First Party, and Second Party has not and shall not have any right, title or interest of any kind or nature whatsoever therein and thereto.

Second Party reaffirms said Quit Claim Deed in favor of First Party, dated August 20, 1943, and will, upon demand by or on behalf of First Party, execute such further quit-claims, deeds, assignments or

Joint Exhibit No. 1-A—(Continued)

other conveyances or documents as First Party may demand in connection with the said property.

Fourteenth: That First Party conveys, transfers and assigns to Second Party, as her sole and separate property, all his right, title and interest in and to all the property, real and/or personal, now in the possession and under the control of Second Party and as though the same were fully set forth and described at this point, and any and all of said property is and shall be the sole and separate property of Second Party, and First Party has not and shall not have any right, title or interest of any kind or nature whatsoever therein or thereto.

That First Party will, upon demand by or on behalf of Second Party, execute such further quitclaims, deeds, assignments or other conveyances or documents as Second Party may demand in connection with the said property.

Fifteenth: That each party does hereby release, remise, quitclaim and discharge all of his or her rights, claims or demands of any kind or nature against the other, does hereby release, remise, waive and discharge all of his or her rights to inherit from the other, or his or her rights to any family or widow's allowance from the other in connection with the estate of the other or otherwise, does hereby release, remise, waive and discharge all his or her rights to administer upon or in connection with the estate of the other, does hereby release, remise, quitclaim and waive any right to

Joint Exhibit No. 1-A—(Continued)

maintenance and/or support from the other excepting as set forth herein, does hereby release, remise, waive and discharge the other from any rights of either to attorney's fees and/or court costs in any action or actions now pending or that may be commenced, excepting as otherwise specifically set forth herein, does hereby waive the right of either to declare a homestead out of the property of the other, or out of any community property, does hereby release, remise, waive and discharge each other from any right to share in any insurance policies heretofore issued or hereafter to be issued, and does hereby release, remise, quitclaim and discharge any and all claims, rights or demands that either may have, or has had, or might have in the future, of any kind or nature whatsoever in the property of the other, or against the other, while living, or against the estate of the other, now or hereafter.

Sixteenth: That neither party will contract or incur any bills or obligations in the name of the other, and that neither party shall be liable for any bills, obligations, contracted or incurred by the other.

Seventeenth: That this agreement constitutes a final and complete determination, settlement and adjustment of the property rights, interests and obligations of the parties hereto, and of their rights as set forth in this Agreement.

Eighteenth: That any property, real or personal, hereafter acquired by either party shall be the

Joint Exhibit No. 1-A—(Continued)

separate property of such party and the other shall have no right, title or interest therein or thereto.

That all earnings and/or accumulations of First Party of every kind or nature whatsoever from the date of the execution of this Agreement shall be and remain his sole and separate property and estate, and shall not be nor be deemed to be joint or community property at any time whatever, or at all.

Nineteenth: Nothing in this Agreement contained shall be construed as a waiver or renunciation by either party of any grant, gift, devise or bequest voluntarily made to the other party hereto by Last Will and Testament, deed or otherwise.

Twentieth: Nothing in this Agreement shall be construed as prohibiting Second Party from legally proceeding against any property of the First Party, not exempt from execution, for the purpose of enforcing the terms of the aforesaid promissory notes, or any of them.

Twenty-First: This agreement may be used in any judicial proceedings which may hereafter be brought by either of the parties, or in any judicial proceedings now pending between the parties, and either of the parties hereto may cause this Agreement to be made a part of any judgment or any decree rendered or made in any of the aforesaid judicial proceedings.

Twenty-Second: This Agreement is not made in contemplation of divorce of the parties hereto or

Joint Exhibit No. 1-A—(Continued)

upon any understanding or agreement that either party hereto shall not defend against any action for separate maintenance, divorce or annulment, now pending or hereafter brought by the other party; however, this Agreement is made without prejudice to the rights of either party hereto to sue for divorce, separate maintenance or annulment, and this Agreement shall remain in full force and effect according to its terms, irrespective of the result of any action for separate maintenance, divorce or annulment, now pending, or that may be commenced by either party at any time hereafter.

Twenty-Third: This Agreement is entire; it may not be altered, amended or modified, save by an instrument in writing executed by the parties hereto. It includes all representations of every kind and nature made by one party to the other.

Twenty-Fourth: This Agreement is entered into in the State of California and shall be construed and interpreted under and in accordance with the laws of the State of California.

Twenty-Fifth: That the provisions, covenants and agreements hereof shall apply to and bind the heirs, executors, administrators, successors, assigns and personal representatives of the respective parties, and also inure to their benefit.

Twenty-Sixth: That each of the parties hereto has read this Agreement and has had the same fully explained to them by their respective counsel, and

Joint Exhibit No. 1-A—(Continued)

fully knows, understands and realizes the significance and legal import and effect of the execution of said Agreement, and fully knows and appreciates the legal rights and privileges of each other in the premises; and each party hereby declares and asserts that each is acting freely and voluntarily and free from duress, fraud, menace or misrepresentation of any person whomsoever.

In Witness Whereof, the parties hereto have executed this Agreement, the date first above written.

/s/ JAMES M. FIDLER,
First Party.

/s/ ROBERTA L. FIDLER,
Second Party.

Witness:

VINCENT C. HICKSON,
Attorney for James M. Fidler.

JERRY GIESLER,
Attorney for Roberta L. Fidler.

State of California,
County of Los Angeles—ss.

On this 4th day of February, 1944, before me, the undersigned, a Notary Public in and for said County and State, personally appeared James M. Fidler, known to me to be the person whose name is sub-

Joint Exhibit No. 1-A—(Continued)

scribed to the within instrument, and acknowledged that he executed the same.

Witness My Hand and official seal.

/s/ NELDA C. ROW,
Notary Public in and for Said
County and State.

My Commission expires September 28, 1947.

State of California,
County of Los Angeles—ss.

On this 4th day of February, 1944, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Roberta L. Fidler, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

Witness My Hand and official seal.

/s/ NELDA C. ROW,
Notary Public in and for Said
County and State.

My Commission expires September 28, 1947.

Joint Exhibit No. 1-A—(Continued)

EXHIBIT A

Agreement

This Agreement, made and entered into this 20th day of August, 1943, between James M. Fidler, hereinafter designated as First Party, and Roberta L. Fidler, hereinafter designated as Second Party.

Witnesseth:

Whereas, the parties hereto intermarried on or about the 20th day of February, 1936, and ever since have lived together as husband and wife;

Whereas, there has been no issue of said marriage, however said parties, on or about the 10th day of May, 1942, legally adopted a female child, born on or about the 8th day of May, 1942, which said child is named Bobbe Fidler, Jr.;

Whereas, unhappy differences have arisen and still continue to exist between said parties hereto, and they are not now living together as husband and wife; and

Whereas, said parties hereto are mutually desirous of making a division of property and fully determining and settling their property rights for the present as well as for the future, and to provide for the support and maintenance of said second party and the care, custody, control and maintenance of the aforesaid minor child, by agreement, and without resort to any court for that purpose,

Joint Exhibit No. 1-A—(Continued)

Now, Therefore, in consideration of the premises, and in consideration of the covenants and agreements herein contained, binding upon the respective parties hereto, the said parties hereto do mutually agree and consent to alter, and do hereby alter and change their relations as to property and property rights, and the custody and control of said minor child; and in order to make such property division and to provide more effectually for their mutual maintenance and support, and especially for the maintenance and support of said Second Party and said minor child, and in furtherance of this agreement, said parties hereto hereby mutually further agree as follows:

1. Said First Party, in order to make said division of property, hereby agrees to assign, transfer and convey unto said Second Party as and for her separate property and estate, and he does hereby so assign, transfer and convey unto said second party, for the aforesaid purpose, all of the following described property, to wit:

(a) That certain 1940 Packard 6 Coupe automobile, Engine No. C40203;

(b) Cash in the sum of Twenty Thousand ($20,000.00) Dollars, and/or part cash and part securities consisting of listed stocks or bonds of the equivalent reasonable present market value of said sum of Twenty Thousand ($20,000.00) Dollars.

Said First Party will, concurrently with the execution hereof, in furtherance of this agreement, formally make, execute, acknowledge and deliver to said Second Party a good and sufficient bill of sale

Joint Exhibit No. 1-A—(Continued)

of and to the aforesaid property, wherein and whereby he shall convey all his interest therein to said Second Party.

2. In addition to the foregoing and in full and final payment of support, alimony and alimony pendente lite, First Party will, upon the execution of the within instrument, make, execute and deliver unto said Second Party two (2) certain promissory notes, in words and figures as follows, to wit:

R.L.F.
J.M.F.

"Los Angeles, California,
"August ...., 1943.

"(A) $18,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, or order, at Los Angeles, California, the sum of Eighteen Thousand ($18,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the date hereof, any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of the holder hereof. Should suit be commenced to enforce the payment of this note, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said

Joint Exhibit No. 1-A—(Continued)

suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

. . . . . .

"JAMES M. FIDLER,
"4362 N. Clybourne Avenue,
"Burbank, California."

"Los Angeles, California,
"August ...., 1943.

"(B) $12,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only at Los Angeles, California, the sum of Twelve Thousand ($12,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of September, 1946, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"This promissory note is given by the undersigned

Joint Exhibit No. 1-A—(Continued)

to the payee in accordance with an Agreement executed by and between the parties this date, for the support and maintenance of the payee. This note shall become absolutely void and of no effect upon any remarriage of the payee and whether or not such remarriage shall be valid.

. . . . . .

"JAMES M. FIDLER,
"4362 Clybourne Avenue,
"Burbank, California."

R.L.F.
J.M.F.

3. In addition to the foregoing, First Party will, upon the execution of the within instrument, pay to Bodkin, Breslin & Luddy, as attorneys for Second Party, the sum of Fifteen Hundred ($1,500.00) Dol-
R.L.F.
J.M.F.
lars as and for payment in full for all professional services rendered in and about the preparation and execution of this agreement and in full of attorneys' fees in any uncontested divorce proceeding which may be hereafter instituted by Second Party against First Party in the Superior Court of the State of California, in and for the County of Los Angeles.

4. First Party shall have and he is hereby given, subject to modification or any other order made by a Court of competent jurisdiction, exclusive custody and control of the aforesaid minor child of the parties hereto, provided, however, that First Party

Joint Exhibit No. 1-A—(Continued)

will wholly support, educate and maintain said child and will maintain an adequate and proper home for her at all times hereafter until her majority. The second party shall have the right and privilege, at reasonable times, of visiting said child at the home of First Party, and at such further times and places as shall be mutually agreed upon. Said Second Party may, with the consent of First Party, take said child to her home or place of abode upon reasonable occasions. Neither party shall take said child outside the State of California without the consent of the other.

5. Said Second Party hereby waives, renounces, releases and relinquishes unto said First Party any and all right, title, interest or demand of any nature or description in or to any or all of the property, both real or personal, which said First Party may now own or have any interest in, excluding the property herein given to Second Party; and waives and releases unto said First Party all interest, claims or demands of every nature or character, in and to all property, either real or personal, which said First Party may hereafter acquire or own, and to any and all earnings, profits and income of said First Party, hereby giving, granting and delivering unto said First Party all of her right, title and interest which she now has or hereafter may have, acquire or claim in and to said property, income and profits hereinafter belonging to or appearing in the

Joint Exhibit No. 1-A—(Continued)

name of said First Party, or otherwise; and, except as otherwise hereinafter provided, hereby waives, releases and relinquishes all right of inheritance from said First Party and also hereby waives and releases to said First Party all present and future claims and demands for division of property and for support and maintenance, and to all claims for any alimony pendente lite, permanent alimony, counsel fees and costs, which hereafter be or become the subject of any action or proceeding for divorce or maintenance between the parties hereto, it being expressly agreed that the delivery to Second Party by said First Party of said sum of Twenty Thousand ($20,000.00) Dollars and said Packard automobile is to be and is in full division of property between the parties hereto and that the delivery of said promissory notes and payment of said counsel fees are and shall be in full payment of the support and maintenance of Second Party and of any payments of said alimony allowance, fees or costs; and also hereby waives, renounces and relinquishes all rights and claims of any allowance to herself as family allowance, or otherwise, in the event of the death of said First Party, and also to any probate homestead upon or in any of the property of said First Party, and also waives and relinquishes the right and privilege of declaring, and hereby agrees not to declare a homestead upon any of the property of First Party.

Nothing in this agreement contained shall be construed as a waiver or renunciation by either

Joint Exhibit No. 1-A—(Continued)

party of any grant, gift, devise or bequest voluntarily made to the other party hereto by Last Will and Testament, deed or otherwise.

6. It is further covenanted and agreed by and between the parties hereto that the execution of this agreement is intended to be and is a full, complete and final adjustment, division and settlement of all the property, interests and rights of the parties hereto; and that neither party hereto shall, or will at any time hereafter make or attempt to make any other or further claim upon the other, or upon the property of the other, than as herein agreed and provided; that the respective properties herein stipulated to be transferred and conveyed shall be and remain forever the separate property of the respective parties hereto, free from all claims of the other, and neither of the parties hereto will claim as against the other or as against the heirs, assigns or legal representatives, or otherwise, the increase in value of the property of the other as herein settled.

Nothing in this paragraph nor in any other paragraph or portion of this agreement shall be construed as prohibiting Second Party from legally proceeding against the or any property of First Party, not exempt from execution, for the purpose of enforcing the terms of the aforesaid promissory notes, or either of them.

7. It is further agreed that either of the parties

Joint Exhibit No. 1-A—(Continued)

hereto shall have an immediate right to devise or bequeath by Will their respective interests in the properties belonging to each other under the provisions of this agreement; and that the devisees and legatees under any such will shall and may have the same privileges and rights as the respective testator or testatrix may have or exercise in their respective lifetime.

8. It is further expressly agreed that neither party hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; that neither of them will hereafter at any time assert any right, interest or title as heir at law of the other to any property devised or bequeathed by such will, or as against the estate of the other should the other die intestate; and all claim as such heir of the other, or as surviving husband and wife, respectively, and all right to contest or oppose the last will of the other is hereby expressly waived, together with the right to administer or to apply for letters of administration or letters of administration with the will annexed upon the estate of the other; or will not in any manner interfere with anyone otherwise applying or petitioning for the administration of the estate of the other.

9. It is further agreed that each of the parties hereto will be given the immediate and exclusive

Joint Exhibit No. 1-A—(Continued)

possession and control of any and all of the respective properties owned by them, or herein agreed to be given to them, respectively, and that neither will, without the consent of the other, go upon the property of the other, or go in or upon the business property of the other, and will at no time either enter or molest the other in either the home or abode of the other, or enter or molest the other or interfere with the other in any manner in the place of business of the other; it being understood, however, that Second Party shall have the right and privilege, as herein given, to visit the said minor child as herein provided, at the present home or any home hereafter maintained by said First Party.

10. Said Second Party agrees that she will, concurrently with the execution hereof, or in compliance with any reasonable request of First Party, in furtherance of this agreement, formally make, execute, acknowledge and deliver to said First Party any and all written deeds, quitclaims, assignments or other instruments necessary or proper to effectuate the purposes and objects of this agreement.

11. It is further expressly agreed that each of the parties hereto has read this agreement and has had the same fully explained to them by their respective counsel, and fully know, understand and realize the significance and legal import or effect of the execution of said agreement, and fully know and appreciate the legal rights and privileges of each other in the premises; and hereby declare and assert that

Joint Exhibit No. 1-A—(Continued)

each is acting freely and free from duress, fraud, menace or misrepresentation of any person whomsoever.

12. It is expressly agreed that each and every term herein contained is a material part of this agreement; that time is of the essence hereof; that this agreement shall be and is binding upon the heirs, assigns and legal representatives of the respective parties hereto.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

JAMES M. FIDLER,
First Party.

ROBERTA LAW FIDLER,
Second Party.

EXHIBIT B

Amendment to Agreement of
August 20, 1943

This Agreement, made and entered into this 21st day of October, 1943, by and between James M. Fidler, hereinafter designated as the "Husband," and Roberta L. Fidler, hereinafter designated as the "Wife,"

Witnesseth

It is agreed by and between the parties as follows:

Joint Exhibit No. 1-A—(Continued)

First: Page 3 of the Agreement entered into by and between the parties on the 20th day of August, 1943, shall be deemed to be deleted and the provisions thereof shall be deemed to be substituted by words and figures as follows:

"Los Angeles, California,
"August 20, 1943.

"(a) $18,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, or order at Los Angeles, California, the sum of Eighteen Thousand ($18,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the date hereof, any default in the payment of any installment when due shall cause the whole of said note to become immediately due and payable at the option of the holder hereof. Should suit be commenced to enforce the payment of this note, I promise to pay such additional sum as the court may adjudge reasonable as Attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"/s/ JAMES M. FIDLER,
"4362 N. Clybourne Avenue,
"Burbank, California."

Joint Exhibit No. 1-A—(Continued)

"Los Angeles, California,
"October 21, 1943.

"(b) $12,000.00

"At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only, at Los Angeles, California, the sum of Twelve Thousand ($12,000.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Five Hundred ($500.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of September, 1946, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such addition sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"/s/ JAMES M. FIDLER,
"4362 Clybourne Avenue,
"Burbank, California."

Second: Wife does hereby acknowledge receipt of the said promissory notes hereinabove described.

In Witness Whereof, the parties hereto have

Joint Exhibit No. 1-A—(Continued)

hereunto executed this document this 21st day of October, 1943.

"/s/ JAMES M. FIDLER,
"Husband.

"/s/ ROBERTA LAW FIDLER,
"Wife."

EXHIBIT C

Agreement

This Agreement, made and entered into this 16th day of December, 1943, by and between James M. Fidler, hereinafter designated as "First Party," and Roberta L. Fidler, hereinafter designated as "Second Party:"

Witnesseth

This agreement is a supplement and amendment to the agreement heretofore entered into by and between the parties on the 20th day of August, 1943, as thereafter amended by agreement of October 21, 1943.

It is the purpose of the parties to modify their said prior agreement with respect to the custody and control of the minor child of the parties, and to provide for such custody and control to be exercised by the parties during respective periods to be herein provided.

It is therefore agreed that subject to modification,

Joint Exhibit No. 1-A—(Continued)

or any order made by Court of competent jurisdiction, the custody of the said minor child of the parties shall be and is hereby determined as follows:

(a) First Party shall have the exclusive custody and control of the said minor child from the 1st day of April to the last day of September, of each and every year. That is to say, that First Party shall have exclusive custody and control of the said minor child for a period of six (6) months, beginning on the 1st day of April of each and every year.

(b) Second Party shall have the exclusive custody and control of the said minor child from the 1st day of October of each year to the last day of March of each following year. That is to say, that Second Party shall have exclusive custody and control of the said minor child for a period of six (6) months, beginning on the 1st day of October of each and every year.

Provided, however, Second Party does hereby waive her right to the custody hereby granted for the balance of the year 1943 and agrees that she will not take the custody and control of the child until after the 1st day of January, 1944. It is nevertheless understood that First Party shall be entitled to the exclusive custody and control of the said child for the period beginning April 1, 1944, as hereinabove provided.

Subject to further agreement of the parties and modification, it is understood that during such times

Joint Exhibit No. 1-A—(Continued)

when Second Party shall have the custody and control of the said child, First Party will defray the costs of the following:

(a) A nurse for the said child;

(b) Food for the said child and nurse;

(c) Clothing for the said child;

(d) Medical expense for the said child.

Second Party agrees to account to First Party with respect to any and all such expenses.

In Witnesses Whereof, the parties do hereunto set their hands the day and year first above written.

/s/ JAMES M. FIDLER,
James M. Fidler,
First Party.

/s/ ROBERTA L. FIDLER,
Roberta L. Fidler,
Second Party.

EXHIBIT D

Quitclaim Deed

In consideration of the sum of Ten Dollars ($10.00), and other valuable considerations, receipt of which is hereby acknowledged, Roberta Law Fidler does hereby remise, release and forever quitclaim to James M. Fidler, all the following real

Joint Exhibit No. 1-A—(Continued)

property in the County of Los Angeles, State of California, described as:

(1) Lots 99 and 100 of Tract No. 9517, in the City of Burbank, County of Los Angeles, State of California, as per map recorded in Book 134, Pages 89 to 91, inclusive, of Maps, in the office of the County Recorder;

(2) Lot 110 of Tract No. 9517, in the City of Burbank, County of Los Angeles, State of California, as per map recorded in Book 134, Pages 89 to 91, inclusive, of Maps, in the office of the County Recorder of said County;

(3) Lot 9 of Del Mar Tract as per Map recorded in Book 6, Page 154 of Maps, in the office of the County Recorder of Los Angeles County;

(4) Lot 96 of Tract No. 9517, in the City of Burbank, County of Los Angeles, State of California, as per map recorded in Book 134, Pages 89, 90 and 91 of Maps, in the office of the County Recorder of said County;

(5) Lot 97 of Tract No. 9517, in the City of Burbank, County of Los Angeles, State of California, as per map recorded in Book 134, Pages 89, 90 and 91 of Maps, in the office of the County Recorder of said County;

(6) Lot 98 of Tract No. 9517, in the City of Burbank, County of Los Angeles, State of California, as per map recorded in Book 134, Pages 89 to

Joint Exhibit No. 1-A—(Continued)

91, inclusive, of Maps, in the office of the County Recorder of said County;

(7) The Northerly forty (40) feet of Lot Seven (7) and the Southerly ten (10) feet of Lot Nine (9) of the Schloesser Terrace Tract No. 2, as per map recorded in Book 7, Page 82 of Maps, in the office of the County Recorder of Los Angeles County.

Dated this 20th day of August, 1943.

ROBERTA LAW FIDLER,
Roberta Law Fidler.

State of California,
County of Los Angeles—ss.

On this 20th day of August, 1943, before me, the undersigned, a Notary Public in and for said State and County, personally appeared Roberta Law Fidler, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] A. Z. LUDDY,
Notary Public in and for the County of Los Angeles, State of California.

JOINT EXHIBIT No. 2-B

In the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine

No. 4771

RUTH LAW FIDLER,

Plaintiff,

vs.

JAMES M. FIDLER,

Defendant.

DECREE OF DIVORCE

This Cause came on regularly for trial on the 20th day of March, 1944, before the Hon. Harry M. Watson, Judge of the above-entitled Court, sitting without a jury, plaintiff appearing in person and being represented by Wiley & Ralli, her attorneys, and the defendant being represented by Clarence A. Eddy, his attorney, and evidence having been introduced in support of the Complaint, and the defendant having failed to introduce any evidence in support of the Answer, the Court, after hearing the evidence and considering all and singular the law and the premises finds it has jurisdiction over the parties hereto and over the subject matter hereof and that each and every of the allegations contained in plaintiff's Complaint are true and that plaintiff is entitled to a decree of divorce on the ground as set forth in the Complaint on file herein.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the marriage relationship now and heretofore exisiting between plaintiff and de-

fendant be and the same is hereby dissolved and the parties are restored to the status of single persons.

It Is Further Ordered, Adjudged and Decreed that that certain Settlement Agreement entered into between the parties, dated February 4, 1944, be and the same is hereby confirmed, ratified, approved and adopted as a part of this Decree.

It Is Further Ordered, Adjudged and Decreed that the defendant herein have the care, custody and control of the minor child, named Bobbe Fidler, Jr., until October 1, 1944, and thereafter the plaintiff is to have the custody of the child for the next ensuing six months, or until April 1, 1945; thereafter the custody of said child shall be distributed to the parties for six months each, until further order of this Court; that during the term plaintiff has custody of the said minor child, defendant shall pay to her for the care, support and maintenance of said child, the sum of Two Hundred ($200.00) Dollars per month.

It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

The Court herewith retains jurisdiction herein with reference to the said minor child for the purpose of making such orders as may hereafter appear to best serve the interest of said minor child.

Dated and Done this 20th day of March, 1944.

HARRY M. WATSON,
District Judge.

Office of County Clerk and Ex Officio Clerk of the Seventh Judicial District Court in and for White Pine County, Nevada

State of Nevada,
County of White Pine—ss.

I, F. D. Oldfield, County Clerk and ex officio Clerk of the Seventh Judicial District Court of the State of Nevada, County of White Pine, do hereby certify that the above and foregoing is a full, correct and true copy of the original Decree of Divorce Dated March 20, 1944, Ruth Law Fidler vs. James M. Fidler, File No. 4771, which now remains of record in my office at Ely, County and State aforesaid.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of Said Court, at my office in the City of Ely, State of Nevada, this 8th day of May, A.D. 1944.

[Seal] F. D. OLDFIELD,
County Clerk and Ex Officio
Clerk of Said Court;

By E. G. CHAMBERLAIN,
Deputy.

Filed May 6, 1944. (Seventh Judicial Court.)

Admitted in evidence Feb. 5, 1952.

JOINT EXHIBIT No. 3-C

In the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine

No. 4771

RUTH LAW FIDLER,

Plaintiff,

vs.

JAMES M. FIDLER,

Defendant.

AMENDED DECREE OF DIVORCE

This Cause came on regularly for trial on the 20th day of March, 1944, before the Hon. Harry M. Watson, Judge of the above-entitled Court, sitting without a jury, plaintiff appearing in person and being represented by Wiley & Ralli, her attorneys, and the defendant being represented by Clarence A. Eddy, his attorney, and evidence having been introduced in support of the Complaint, and the defendant having failed to introduce any evidence in support of the Answer, the Court, after hearing the evidence and considering all and singular the law and the premises finds it has jurisdiction over the parties hereto and over the subject matter hereof and that each and every of the allegations contained in plaintiff's Complaint are true and that plaintiff is entitled to a decree of divorce on the ground as set forth in the Complaint on file herein.

Now, Therefore, it is hereby Ordered. Adjudged

and Decreed that the marriage relationship now and heretofore existing between plaintiff and defendant be and the same is hereby dissolved and the parties are restored to the status of single persons.

It Is Further Ordered, Adjudged and Decreed, that that certain Settlement Agreement entered into between the parties, dated February 4, 1944, be and the same is hereby confirmed, ratified, approved and adopted as a part of this Decree.

It Is Further Ordered, Adjudged and Decreed that the defendant herein have the care, custody and control of the minor child, named Bobbe Fidler, Jr., until October 1, 1944, and thereafter the plaintiff is to have the custody of the child for the next ensuing six months, or until April 1, 1945; thereafter the custody of said child shall be distributed to the parties for six months each, until further order of this Court; that during the term plaintiff has custody of the said minor child, defendant shall pay to her for the care, support and maintenance of said child, the sum of Two Hundred ($200.00) Dollars per month.

It Is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any time before August 1, 1948, not

have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract, and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder.

It Is Further Ordered, Adjudged and Decreed, that all executory provisions of said Settlement Agreement which are not incorporated in this Decree in a plenary manner, are hereby declared to be binding on the respective parties hereto, and each of said parties is hereby ordered to do and perform all acts and obligations required to be done or performed by said executory provisions of said Settlement Agreement.

The Court herewith retains jurisdiction herein with reference to the said minor child for the purpose of making such orders as may hereafter appear to best serve the interests of said minor child.

Dated and Done this 20th day of March, 1944.

HARRY M. WATSON,
District Judge.

Office of County Clerk and Ex Officio Clerk of the Seventh Judicial District Court in and for White Pine County, Nevada

County of White Pine,
State of Nevada—ss.

I, F. D. Oldfield, County Clerk and ex officio Clerk of the Seventh Judicial District of the State of Nevada, County of White Pine, do hereby certify that the above and foregoing is a full, correct and true copy of the original "Amended Decree of Divorce," Ruth Law Fidler, Plaintiff, vs. James M. Fidler, Defendant, which now remains of record in my office at Ely, County and State aforesaid.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court, at my office in the town of Ely, this First day of January, A.D. 1945.

/s/ F. D. OLDFIELD,
County Clerk and Ex Officio
Clerk of Said Court.

By .....,
Deputy.

Filed Nov. 16, 1944. (Seventh Judicial Court.)

Admitted in evidence February 5, 1952, T.C.U.S.

[Title of Tax Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

The parties to this proceeding, through their respective counsel of record, hereby stipulate that the following facts are true and may be found as facts by the court, subject to the right of either party to enter objections on the grounds of relevancy or materiality, and the right of either party to present other items of proof, either related or unrelated, to the facts herein stated but not inconsistent therewith:

I.

That Exhibit 5 attached hereto is a true and correct copy of a letter written on May 18, 1944, by Mr. Vincent C. Hickson, attorney at law of Los Angeles, California, to Mr. Paul Ralli of the law firm of Wiley and Ralli of Las Vegas, Nevada. That Mr. Hickson acted as attorney for petitioner herein in the preparation of the agreement of settlement and separation between petitioner and Ruth Law Fidler dated February 4, 1944, introduced in this cause as Exhibit 1-A; that Mr. Paul Ralli is a partner in the law firm of Wiley and Ralli, which firm represented Ruth Law Fidler in the divorce action filed by her against petitioner herein in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, the same being case No. 4771.

II.

That Exhibit 6 attached hereto is a true and correct copy of a letter written on May 22, 1944, by said Paul Ralli to said Vincent C. Hickson.

III.

That Exhibit 7 attached hereto is a true and correct copy of a letter written on August 31, 1944, by said Vincent C. Hickson to said Paul Ralli.

IV.

That Exhibit 8 attached hereto is a true and correct copy of a letter written on September 7, 1944, by said Paul Ralli to said Vincent C. Hickson.

V.

That Exhibit 9 attached hereto is a true and correct copy of a letter written on September 8, 1944, by said Vincent C. Hickson to said Paul Ralli.

VI.

That Exhibit 10 attached hereto is a true and correct copy of a letter written on September 19, 1944, by said Vincent C. Hickson to said Paul Ralli.

VII.

That Exhibit 11 attached hereto is a true and correct copy of a letter written on October 5, 1944, by said Vincent C. Hickson to said Paul Ralli.

VIII.

That Exhibit 12 attached hereto is a true and correct copy of a letter written on October 9, 1944, by said Paul Ralli to said Vincent C. Hickson.

IX.

That said copies of said letters may be introduced in evidence in this cause with the same force and effect as if the originals thereof were introduced.

Dated: This 7th day of February, 1952.

RAYMOND C. SANDLER, and
NELSON ROSEN,

By /s/ NELSON ROSEN,
Attorneys for Petitioner,
James M. Fidler.

/s/ MASON B. LEMING,
Acting Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

EXHIBIT No. 5

May 18, 1944.

Paul Ralli, Esq.,
Attorney at Law,
Las Vegas, Nevada.

Re: Fidler vs. Fidler, No. 4771, in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine.

Dear Sir:

The undersigned is attorney for Jimmie Fidler, having represented him in the preparation of Agreement dated February 4, 1944, between himself and Bobbe.

Jimmie has just handed to me your letter to him dated May 10, 1944, enclosing certified copy of Decree of Divorce, dated March 20, 1944, filed May 6, 1944, in the above-entitled case.

The various orders included in said decree are all consistent with the terms of said agreement dated February 4, 1944, except the following, to wit:

> "It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years."

The Agreement provides for payments of $500.00 per month to and including August 1, 1948, and for an additional sum of $300.00 per month providing Jimmie earns between the date of said Agreement and August 1, 1948, from radio contracts, a sum equal to the amount he is now receiving under his present radio contract. Should he lose his radio contract, payments to the extent of $300.00 per month are waived. Should his compensation under future radio contracts be reduced, monthly payments to the extent of $300.00 shall be proportionately reduced.

It is therefore suggested that you arrange by stipulation with Clarence A. Eddy to amend the Decree of Divorce by deleting the foregoing quoted portion and by inserting in lieu thereof the follow-

ing paragraphs which correctly set forth the understanding and agreement of the parties:

"It Is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any time before August 1, 1948, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract, and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder.

"It Is Further Ordered, Adjudged and Decreed, that all executory provisions of said Settlement Agreement which are not incorporated in this Decree in a plenary manner, are hereby declared to

be binding on the respective parties hereto, and each of said parties is hereby ordered to do and perform all acts and obligations required to be done or performed by said executory provisions of said Settlement Agreement."

When the Decree is amended in accordance with the foregoing suggestions, I would appreciate your mailing to me a certified copy of same for delivery to Jimmie.

Very truly yours,

VINCENT C. HICKSON.

VCH/LP

EXHIBIT No. 6

Law Offices of
Wiley & Ralli
Western Union Building
Las Vegas, Nevada

May 22, 1944.

Burke, Hickson, Burke & Marshall,
Attorneys at Law,
Suite 720 Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

Attention: Mr. Vincent C. Hickson.
Re: Fidler vs. Fidler.

Dear Mr. Hickson:

Thank you for your letter of May 18th.

I have taken the matter up with my partner,

Roland H. Wiley, who handled the above-entitled case in Ely, Nevada, and he assured me that the inconsistency of the provision mentioned in your letter was due to inadvertence.

We are taking the matter up with Mr. Eddy and we will be glad to send, in due course, the modification that you require.

Hoping to have some business relations between our firms in the future, I remain,

Sincerely yours,

WILEY & RALLI,

By /s/ PAUL RALLI.

PR:MWD

EXHIBIT No. 7

August 31, 1944.

Paul Ralli, Esq.,
Attorney at Law,
Las Vegas, Nevada.

Re: Fidler vs. Fidler, No. 4771, in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine.

Dear Sir:

On May 18, 1944, I wrote to you suggesting certain amendments in the Decree of Divorce in the above-entitled case. On May 22, 1944, you answered

and advised that the decree would be modified as I required.

If the amendment has been made as suggested, I would appreciate a certified copy of the Decree, as amended. If the amendment has not been made to date, I would appreciate your taking steps to cause the amendment to be made at your most early opportunity.

Very truly yours,

VINCENT C. HICKSON.

VCH/LK
Dictated but not read by Mr. Hickson.

EXHIBIT No. 8

Law Offices of
Wiley & Ralli
Western Union Building
Las Vegas, Nevada

September 7th, 1944.

Vincent C. Hickson,
Attorney at Law,
Suite 720, Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

Dear Mr. Hickson:

I am sorry for the delay in modifying the Fidler decree. I turned this matter over to my partner and I presumed that it was taken care of.

If you will send me a copy of the decree in the way you wish it modified, I will forward it immediately to the court in Ely and have the judge sign an amended decree.

Sincerely,

WILEY & RALLI,

By /s/ PAUL RALLI.

PR:LK

EXHIBIT No. 9

September 8, 1944.

Paul Ralli, Esq.,
Attorney at Law,
Western Union Building,
Las Vegas, Nevada.

Re: Fidler vs. Fidler.

Dear Sir:

Enclosed herein please find five copies of the proposed amended Decree of Divorce, to be signed and filed in the above action. After the amended Decree is filed, one copy should be certified and returned to me. The extra copies are for your files and Mr. Edy's files.

Very truly yours,

VINCENT C. HICKSON.

VCH/LK
Encls.

EXHIBIT No. 10

September 19, 1944.

Paul Ralli, Esq.,
Attorney at Law,
Western Union Bldg.,
Las Vegas, Nevada.

Re: Fidler vs. Fidler.

Dear Sir:

If the Court in Ely has signed and filed the Amended Decree in the above-entitled action, I would appreciate your forwarding certified copy thereof immediately. I have immediate use for the same.

Very truly yours,

VINCENT C. HICKSON.

VCH/LK

EXHIBIT No. 11

October 5, 1944.

Mr. Paul Ralli, Esquire,
Attorney at Law,
Western Union Building,
Las Vegas, Nevada.

Re: Fidler vs. Fidler.

Dear Mr. Ralli:

I must have a certified copy of the amended

decree in the above case for immediate use. Will you please oblige by forwarding same at once.

Very truly yours,

BURKE, HICKSON, BURKE
& MARSHALL,

By /s/ VINCENT C. HICKSON.

VCH:hmj

EXHIBIT No. 12

Law Offices of
Wiley & Ralli
Western Union Building
Las Vegas, Nevada

October 9th, 1944.

Vincent C. Hickson,
Attorney at Law,
458 South Spring Street,
Los Angeles, California.

In re: Fidler v. Fidler.

Dear Mr. Hickson:

I am sincerely sorry for the delay in receiving the modified decree in the above matter. I assure you that I am doing all I can to get this decree.

However, we have to have the cooperation of the attorney who represented Mr. Fidler under the power of attorney, namely, Clarence A. Eddy at Ely, Nevada. We sent him an amended decree on

September 11th and have written to him since emphasizing the importance of having it signed and filed. Up to the present time we have had no response from him. I tried to locate him by telephone today but was unable to do so. I will write him again and if I receive no reply I will contact Judge Watson himself.

Please be assured that we are doing all we can to expedite this matter. Inasmuch as Mr. Eddy has our consent for such modification and he represented Mr. Fidler, why not take this matter up direct with him and ascertain the reason for the delay?

Sincerely,

WILEY & RALLI,

By /s/ PAUL RALLI.

PR:LK

Filed February 13, 1952. T.C.U.S.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

1. An agreement entered into by petitioner (a radio commentator) and his wife on February 4, 1944, provided that he should pay her $500 per month until September, 1948, and that, in addition thereto, he should pay her $16,200 in installments of $300 per month over the same period, the latter

payments to be reduced if his radio income was reduced and to be waived for any months in which he had no radio income. The agreement was adopted and became a part of a divorce decree, which provided that he should pay to his divorced wife "in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month" with the proviso that $300 of each $800 monthly payment was subject to reduction in the event of decreased radio earnings. Held, both the $500 and $300 components of each $800 payment made by petitioner during the taxable years and subsequent to divorce decree constituted "installment payments" within the meaning of Section 22 (k), I.R.C., and were therefore not deductible by petitioner under Section 23 (u), I.R.C.

2. Loss sustained by petitioner from the sale in 1945 of certain books and manuscripts purchased in 1937, held to be a loss from the sale of capital assets and subject to the provisions of Section 117 (b) and (d) of the Internal Revenue Code.

Nelson Rosen, Esq., for the petitioner.

W. Lee McLane, Esq., for the respondent.

Respondent determined deficiencies in the income tax of petitioner as follows:

Year	Deficiency
1944	$ 7,316.60
1945	10,293.79
1946	6,992.74

The questions involved are: (1) Whether the respondent erred in disallowing as deductions payments of $9,000, $9,600 and $9,600 made by petitioner to his divorced wife during the years 1944, 1945 and 1946, and (2) whether the respondent erred in determining that a loss of $4,750, resulting from the sale by petitioner in 1945 of certain books and manuscripts, was a long-term capital loss subject to the provisions of Section 117 (b) and (d) of the Internal Revenue Code.

This Court has previously considered the issues involved in this proceeding in a Memorandum Opinion entered November 21, 1952, and decision pursuant to our determination therein was entered November 25, 1952. On December 15, 1952, the petitioner filed a motion for reconsideration of the opinion. An order was issued on January 6, 1953, granting the motion for reconsideration, and on January 23, 1953, the decision entered on November 25, 1952, was vacated and set aside. The petitioner's motion for reconsideration was directed to the opinion of this Court on Issue 1, relating to alimony payments, and not to Issue 2, relating to the sale of certain books and manuscripts.

Findings of Fact

Part of the facts have been stipulated, and these stipulated facts are incorporated herein by reference.

Petitioner is a resident of Los Angeles, California. He filed his income tax returns for the calendar years 1944, 1945 and 1946 with the Collector of In-

ternal Revenue for the Sixth District of California at Los Angeles.

In 1936 petitioner was married to Ruth Law Fidler, sometimes known as Roberta Law Fidler and Roberta L. Fidler (hereinafter referred to as "Ruth Fidler").

There was no issue of this marriage, and in 1942 petitioner and Ruth Fidler adopted a newly-born baby girl.

Thereafter, petitioner and Ruth Fidler became separated, and on August 20, 1943, they entered into a written agreement which provided, among other things, that petitioner should have the exclusive custody and control of the minor child, subject to Ruth Fidler's right to reasonable visitation; that upon the execution of the agreement, Ruth Fidler should receive, as her share and in full division of the property of the parties, a certain Packard automobile and $20,000 in cash or securities; and that, in addition thereto, petitioner would pay to Ruth Fidler, in full and final payment for her support, maintenance and alimony, the sum of $30,000 in monthly installments of $500 per month, commencing on September 1, 1943. Petitioner's obligation to make such payments at the rate of $500 per month to Ruth Fidler for her support and maintenance was evidenced by two promissory notes executed by petitioner and delivered to her, concurrently with the execution of said agreement, and the terms of the notes were set forth in full in said agreement. One of the notes provided for the pay-

ment to Ruth Fidler of the sum of $18,000, payable in consecutive, monthly installments of $500 per month commencing on September 1, 1943. The second note provided for the payment of the sum of $12,000, payable in consecutive, monthly installments of $500 per month, commencing on October 1, 1946. Each note contained a provision that in the event petitioner defaulted in the payment of any installment when due, the whole note might become immediately due and payable at the option of Ruth Fidler or the holder thereof, and that should suit be commenced to enforce payment of the note, petitioner would pay such additional sums as attorney's fees as the court might adjudge to be reasonable. The $12,000 note, only, contained the following additional provision:

> This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, for the support and maintenance of the payee. This note shall become absolutely void and of no effect upon any remarriage of the payee and whether or not such remarriage shall be valid.

The agreement of August 20, 1943, was prepared by a firm of Los Angeles attorneys who represented Ruth Fidler.

On October 21, 1943, an amendment to the agreement of August 20th was executed by petitioner and Ruth Fidler, the effect of which was to eliminate the provision above quoted appearing in the

$12,000 note, and Ruth Fidler acknowledged receipt of the $12,000 note, as thus amended, and also the $18,000 note above referred to.

On December 16, 1943, the aforesaid agreement was again supplemented and amended to provide, in effect, that Ruth Fidler should have exclusive custody and control of the minor child of the parties for a period of six months during each year and that petitioner should have the exclusive custody and control of the child for a like period of six months during each year; and that during such times as Ruth Fidler should have the custody and control of the child petitioner would pay the costs of a nurse, food, clothing and medical expense for the child.

On February 4, 1944, the petitioner and Ruth Fidler entered into a new agreement, which superseded their previous agreements. This new agreement also made provision for the custody and support of the minor child of the parties, and settled all rights and claims in respect of property and support between the parties. It, in substance, provided among other things that each of the parties should have the exclusive custody and control of their minor child for six months during each year, and that petitioner would pay to Ruth Fidler for the care, support and maintenance of the child during the period that she should have its custody and control the sum of $200 per month as well as any extraordinary medical care and attention required for the child; that in addition to the Packard

automobile and $20,000 in cash or securities theretofore transferred by petitioner to Ruth Fidler as her share of and in full division of the property of the parties, petitioner agreed to and did transfer to her an additional sum of $7,000 in cash or securities. In addition to the foregoing, and with respect to alimony, support and maintenance for Ruth Fidler, the agreement provided as follows:

> Seventh: In addition to the foregoing, and on account of full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party does hereby redeliver to Second Party, and Second Party will retain, those two (2) certain promissory notes, being the same notes described in Paragraph First of Amendment to Agreement of August 20, 1943, in words and figures as follows, to wit: * * *

After setting forth, verbatim, the terms of the two promissory notes hereinbefore referred to, as amended on October 21, 1943, the agreement goes on to provide for additional payments in the form of a third promissory note as follows:

> In addition to the foregoing and in full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto,

First Party will, upon the execution of the within instrument, make, execute and deliver unto Second Party one (1) promissory note, in words and figures as follows, to wit:

$16,200.00.

Los Angeles, California,
February 4, 1944.

At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only at Los Angeles, California, the sum of Sixteen Thousand Two Hundred ($16,200.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Three Hundred ($300.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of March, 1944, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, on account of the support and maintenance of the payee. Should payor, at any time during the term

hereof, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, the monthly installments falling due hereunder during said periods shall be reduced in proportion to the amount of the reduction of his present radio contract, and should payor have no radio contract at all, then all monthly installments falling due hereunder during said period, shall be waived by payee, and payor shall not be required at any future time to pay the balance of any reduced, or waived payments, hereunder.

/s/ JAMES M. FIDLER,
4362 Clybourne Avenue,
Burbank, California.

That Second Party accepts said three (3) promissory notes, for her support and maintenance and not in lieu of property rights, upon the following conditions:

(a) In lieu of other provision for the support and maintenance of Second Party during her natural life;

(b) In full payment, discharge and satisfaction of all obligations or any thereof, on the part of First Party to maintain or support Second Party during her natural life;

(c) In full payment, discharge and satisfaction of counsel fees and costs in any pending or future action between the parties hereto,

other than an action on said or any of said promissory notes.

Eighth: That the installment payments provided in the three (3) promissory notes hereinabove set forth, being taxable to her as income, Second Party will, from and after the date hereof, file such income and tax returns and/or declarations, both Federal and State, as are required by law, and will include therein all such support and maintenance payments received by her, and will pay all taxes shown to be due and payable under such returns and/or declarations.

Should any of the monthly installments provided for in the said $16,200.00 promissory note, last above described, be reduced or waived and the payor not be required to make same, First Party will give to Second Party, not for her support and maintenance, but as an absolute gift without condition, sufficient moneys to enable Second Party to pay her income taxes, both Federal and State, when due, on support and maintenance payments received from First Party, but not on income received by Second Party in excess thereof, without resort to the support and maintenance payments provided for in the two other promissory notes, above described, it being the intention of the parties hereto that Second Party will, during any period that the payments under said promissory note last above described are reduced or waived, have a net minimum sum of $500.00 per month for her support and maintenance.

In the preparation and execution of the agreement of February 4, 1944, petitioner and Ruth Fidler were each represented by attorneys of Los Angeles, California.

At the time of the execution of the agreement and for several years prior thereto, petitioner's principal business or occupation was that of radio commentator and newspaper columnist.

The "present radio contract" referred to in the agreement of February 4, 1944 (and in the amended decree of divorce hereinafter referred to), was a contract which was in force on February 4, 1944, and March 20, 1944, between petitioner and the sponsor of a weekly radio broadcast program under which petitioner was engaged to render his services as a commentator and reporter on said weekly radio program. The term of the radio contract was 26 weeks. The sponsor, however, had the option to renew and extend the contract of employment for additional, successive terms of 26 weeks' duration.

In 1944 Ruth Fidler, as plaintiff, instituted an action in the District Court of the State of Nevada in the County of White Pine against petitioner, as defendant, wherein she prayed that she be granted a divorce from petitioner and that the agreement of settlement and separation aforesaid of February 4, 1944, be approved by the court.

Ruth Fidler was represented in said action by a firm of attorneys of Las Vegas, Nevada.

Petitioner never personally appeared in the Nevada divorce action, but authorized an attorney of Ely, Nevada, to appear for him.

The divorce action was tried at Ely, Nevada, on March 20, 1944, and a decree of divorce was rendered in favor of Ruth Fidler against petitioner.

The formal decree of divorce as signed by the judge of the court adjudged and ordered as follows:

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the marriage relationship now and heretofore existing between plaintiff and defendant be and the same is hereby dissolved and the parties are restored to the status of single persons.

It Is Further Ordered, Adjudged and Decreed that that certain Settlement Agreement entered into between the parties, dated February 4, 1944, be and the same is hereby confirmed, ratified, approved and adopted as a part of this Decree.

It Is Further Ordered, Adjudged and Decreed that the defendant herein have the care, custody and control of the minor child, named Bobbe Fidler, Jr., until October 1, 1944, and thereafter the plaintiff is to have the custody of the child for the next ensuing six months, or until April 1, 1945; thereafter the custody of said child shall be distributed to the parties for six months each, until further order of this Court; that during the term plaintiff has custody of the said minor child, defendant shall pay to her for the care, support and maintenance of said child, the sum of Two Hundred ($200.00) Dollars per month.

It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agree-

ment, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

The Court herewith retains jurisdiction herein with reference to the said minor child for the purpose of making such orders as may hereafter appear to best serve the interest of said minor child.

Dated and Done this 20th day of March, 1944.

HARRY M. WATSON,
District Judge.

The decree was inconsistent and ambiguous, in that while it "confirmed, ratified, approved and adopted as a part" of it the settlement agreement entered into between petitioner and Ruth Fidler on February 4, 1944, and ordered petitioner to make payments to Ruth Fidler "in accordance with the terms of said Settlement Agreement," it also provided that such payments should be "the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years."

When the Los Angeles attorney who had represented petitioner in the preparation of the settlement agreement of February 4, 1944, received a copy of the above decree, he immediately noted the inconsistency of its provisions, and communicated with Ruth Fidler's attorneys in Las Vegas, Nevada, concerning it, and suggested that the decree be amended to reflect correctly the terms of the settlement agreement.

The inconsistency in the decree was due to inadvertence, and Ruth Fidler's attorneys agreed that the decree should be amended. A form of amended decree was prepared, and on September 11, 1944, Ruth Fidler's attorneys sent such form of amended decree to the attorney at Ely, Nevada, who had appeared for petitioner in the divorce action, and requested him to present the proposed amended decree to the court.

Thereafter, on September 18, 1944, upon application of the attorney, the court ordered that the decree of divorce be amended to recite correctly the terms and provisions of the agreement of settlement between petitioner and Ruth Fidler.

An amended decree, as filed on November 16, 1944, contained the exact terms and language as set forth in the original decree above-quoted except that the following paragraph was deleted:

> It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

and in lieu thereof the following paragraphs were substituted:

> It Is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement

agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any time before August 1, 1948, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder.

It Is Further Ordered, Adjudged and Decreed, that all executory provisions of said Settlement Agreement which are not incorporated in this Decree in a plenary manner, are hereby declared to be binding on the respective

> parties hereto, and each of said parties is hereby ordered to do and perform all acts and obligations required to be done or performed by said executory provisions of said Settlement Agreement.

The amended decree was dated and signed by the same judge who had tried the divorce action and signed the original decree, in the following fashion:

> Dated and Done this 20th day of March, 1944.
>
> /s/ HARRY M. WATSON,
> District Judge.

On and prior to March 20, 1944, petitioner had paid and transferred to Ruth Fidler all moneys and properties due to her under the terms of the settlement agreement of February 4, 1944, had paid certain sums required to be paid to her attorneys for representing her, and had made all payments to her which had then become due and payable to her pursuant to the terms of the promissory notes referred to and described in the agreement. After March 20, 1944, and during the years 1944, 1945 and 1946, petitioner also paid Ruth Fidler all sums which he was obligated to pay to her under the terms of the settlement agreement and the decree of divorce for the care, support and maintenance of the minor child of the parties. In addition to the foregoing, petitioner, pursuant to the terms of the agreement and decree, paid to Ruth Fidler as alimony and for her support and maintenance the

sum of $800 each month during the period commencing April 1, 1944, and ending December 31, 1946.

The divorce decree as amended remained in full force and effect during the years 1945 and 1946.

During the period from February 4, 1944, to December 31, 1946, the sponsor of the weekly radio broadcast program hereinbefore referred to, to whom petitioner was under contract on February 4, and March 20, 1944, exercised its option to renew and extend said contract with the result that petitioner was continuously employed by this sponsor during this period and received, under the contract and the renewals and extensions thereof, monthly compensation equal to the monthly compensation which he had been receiving under said radio contract on February 4 and March 20, 1944.

On his income tax return for the calendar year 1944, petitioner claimed deductions in the sum of $9,000 by reason of alimony payments made to Ruth Fidler during said year. Of this sum, $1,800 was paid by petitioner prior to the rendition of the decree of divorce on March 20, 1944, and at the trial of this proceeding, petitioner conceded that such sums aggregating $1,800 paid prior to the decree of divorce would not be properly deductible by him.

In his income tax returns for the calendar years 1945 and 1946 petitioner claimed deductions in each year in the sum of $9,600 by reason of the alimony payments made to Ruth Fidler during those years.

Respondent, in his notice of deficiency, disallowed the deductions claimed in each year upon the ground that "said amounts do not qualify as proper deductions under the provisions of section 23(u) of the Internal Revenue Code."

In the year 1937, petitioner acquired by assignment and transfer from William N. Selig a stock of literary properties consisting of all of Selig's literary rights, motion picture rights and other property rights, of every kind and nature, in approximately seventy-five published novels and stage plays, and approximately 2,000 original manuscripts, scenarios, and motion picture shooting scripts. Petitioner paid Selig $5,000 for these properties.

A Mr. Bentel, who was a literary agent and friend of petitioner, induced petitioner to buy the literary properties. Bentel advised petitioner that Selig was in failing health and was willing to sell these properties at what Bentel considered to be a reasonable price because among them were some properties which Bentel believed were quite good and which might be sold to motion picture studios at a profit.

Petitioner had an oral understanding with Bentel that Bentel would conduct a campaign to sell the stories, books, or plays, and that after petitioner recouped his $5,000 investment from such sales, he and Bentel would thereafter divide the returns on a "fifty-fifty" basis.

After the literary properties were acquired, a tabulation was made of them, and they were placed on display in the offices of Bentel.

Petitioner purchased the literary properties with the intention of attempting to sell some of them at a profit. They were not purchased for use in his work as a commentator or columnist, and none of them was ever used in such work. No sale of any of the literary properties was consummated prior to 1945, although at one time petitioner and Bentel thought a studio was going to purchase a book entitled "Under Two Flags." In 1945, petitioner sold all of the literary properties acquired from Selig for $250, to Eric Ergenbright, who was, and had been, an employee of petitioner for many years.

In his income tax return for the year 1945, petitioner claimed a deduction in the amount of $4,750 as an ordinary loss. In determining the deficiency the respondent disallowed the claimed deduction stating that the "ordinary loss claimed of $4,750.00 from sale of Selig Library of books and manuscripts has been determined to be a loss from the sale of capital assets held for more than six months and subject to the provisions of section 117(b) and (d) of the Internal Revenue Code."

Opinion

Raum, Judge:

1. Petitioner seeks to deduct the payments of $800 a month made by him to his divorced wife, Ruth Fidler, in accordance with the divorce decree

and the agreement between them adopted as part of the decree. Section 23(u) of the Internal Revenue Code[1] allows a divorced husband to deduct payments made by him to his divorced wife which are includible in her gross income under Section 22 (k).[2] The issue herein is whether the payments in controversy were "installment payments discharging a part of an obligation the principal sum of

---

[1]Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

* * *

(u) Alimony, Etc., Payments.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. * * *

---

[2]Sec. 22. Gross Income.

* * *

(k) Alimony, Etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments * * * received subsequent to such decree in discharge of, * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, * * * Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this sub-

which is, in terms of money or property, specified in the decree or instrument" incident to such decree. If they were such "installment payments," then they are not taxable to the divorced wife as income under Section 22(k), nor are they deductible by the husband under Section 23(u). Respondent contends that the $800 monthly payments constitute nondeductible "installment payments," and, in the alternative, that $500 of each $800 payment is nondeductible.

We think it clear that the $800 monthly payments required by the divorce decree, as amended, consisted of two separate components of $500 and $300, each. Petitioner was obligated to pay $500 a month unconditionally for 53 months, the unexpired period covered by the first two notes under the separation agreement; moreover, he was obligated to pay an additional $300 a month for the same period, depending upon his employment as a radio commentator. If he should fail to obtain subsequent radio contracts, the obligation in relation to the $300 payments was to cease; if he should obtain such contracts with reduced compensation, his obligation to the extent of $300 monthly was to be diminished proportionately. That the $800 payments consisted of these two separate parts is plain

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section if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife * * * does not exceed 10 per centum of such principal sum. * * *

not only from the face of the decree, but also from the separation agreement which was explicitly incorporated into the decree by reference.[3]

The obligation set forth in the decree was stated to be "in accordance with the terms of * * * [the] Settlement Agreement" of February 4, 1944, and the decree itself expressly approved and "adopted" the agreement as part of the decree. And in the separation agreement, which was thus made part of the decree, petitioner agreed to redeliver to his wife two promissory notes calling unconditionally for payments of $500 a month. These notes were set forth verbatim in the agreement. In addition the agreement required petitioner to execute and deliver a third note, payable in installments of $300 a month over the remaining period covered by the first two notes. The third note, also set forth verbatim in the agreement, explicitly provided for reduction or elimination of the payments thereunder, depending upon petitioner's earnings under radio contract.

We are satisfied that to the extent of $500 a month petitioner's payments are "installment pay-

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[3]Compare Edward Bartsch, 18 T.C. 65, 69 (affirmed, ..F. 2d ..(C.A.2)): * * * The plan of payment may have been a single plan, but we do not think that requires us to press the payments under both paragraphs in the same mold when the parties themselves have differentiated them. * * *

The divorce decree wrought no change in the tax aspects of the situation. It did no more than carry over into the decree the unfulfilled obligations of petitioner and Sarah under the separation agreement, * * *.

ments'' and therefore not deductible. As was said in Estate of Frank P. Orsatti, 12 T.C. 188, 191-192:

> * * * it is of no importance that under the settlement agreement one must multiply the specified weekly payments by the number of weeks over which they were to be paid to determine the principal sum specified. There is at best only a formal difference between such a decree and one where the total amount is expressly set out. * * *

See also Frank R. Casey, 12 T.C. 224, 226; Harold M. Fleming, 14 T.C. 1308, 1311.

To the extent of $300 a month it is at least equally obvious that there was a ''principal sum'' within the meaning of the statute. The obligation to that extent had its inception in the agreement of February 4, 1944, and the third note given pursuant thereto. The note was in the principal amount of $16,200. Petitioner specifically promised to pay to his wife ''the sum of Sixteen Thousand, Two Hundred ($16,200.00) Dollars, without interest,'' in installments of $300 on the ''first day of each * * * month subsequent to the first day of March, 1944.'' The agreement (and notes set forth therein) were explicitly made part of the decree,[4] and it is difficult

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[4]To the extent that there may be any conflict between provisions of the agreement and other parts of the decree, it is abundantly clear that it was the intention that the agreement was to be controlling. In one respect in which there was such a discrepancy, the decree was thereafter amended to conform to the agreement, as shown in our findings.

to see why we do not have here "installment payments discharging a part of an obligation the principal sum of which is * * * specified in the decree or instrument." The words of the statute are plain, and it is clear that the present situation is covered by those words.

Petitioner stresses the fact that his liability in respect of the $300 payments could be reduced or eliminated if he should fail to obtain future radio contracts with at least the same level of earnings. True, such contingency did exist. But we can find nothing in the language of the statute or the legislative history that would justify refusing to apply the clear statutory provision. A similar contention was considered and rejected in J. B. Steinel, 10 T.C. 409; Estate of Frank P. Orsatti, supra; Harold Fleming, supra. In John H. Lee, 10 T.C. 834, and Roland Keith Young, 10 T.C. 724, relied upon by petitioner, no "principal sum" was specified anywhere, and the fluctuating character of the payments was such that it was not thought reasonably possible to spell out a principal sum of an obligation. The Lee and Young cases were relied upon by the petitioners in the Orsatti case, but we held that they "are distinguishable upon the terms of the instruments involved in those cases." 12 T.C. at p. 192.

We are aware that the Court of Appeals for the Second Circuit has recently reversed our decision in F. Ellsworth Baker, 17 T.C. 1610, and has rejected

the theory of the Steinel case. 205 F. 2d 369. We have therefore carefully re-examined our decision in the Steinel case, but can find no basis in the statute for refusing to give effect to its plain language. Notwithstanding the great respect that we have for the Court of Appeals, we feel that we must continue to adhere to the theory of the Steinel case. Cf. American Coast Line v. Commissioner, 159 F. 2d 665, 668-669 (C.A. 2); Estate of William E. Edmonds, 16 T.C. 110, 117.

2. The remaining issue relates to the loss of $4,750 sustained by petitioner upon the sale in 1945 of the books and manuscripts he acquired from Selig.

The petitioner contends that the respondent erred in treating the loss sustained as a long-term capital loss from the sale or exchange of "capital assets"; that the literary properties sold fell within those types of property which were expressly excluded from "capital assets" in Section 117(a)(1), i.e., "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *;" and that the loss was an ordinary business loss deductible in full under the provisions of Section 23(e).

Section 23(e) provides that in computing net income of individuals there shall be allowed as deductions losses sustained during the taxable year (1) if

incurred in trade or business; or (2) if incurred in any transaction entered into for profit, though not connected with trade or business. Section 23(g) provides that losses from sales of capital assets shall be allowed only to the extent provided in Section 117.[5]

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[5]Sec. 117. Capital Gains and Losses.

(a) Definitions.—As used in this chapter—

(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be inincluded in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business;

* * *

(5) Long-Term Capital Loss.—The term "long-term capital loss" means loss from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such loss is taken into account in computing net income;

(b) Deduction From Gross Income.—In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per centum of the amount of such excess shall be a deduction from gross income. * * *.

* * *

(d) Limitation on Capital Losses.—

* * *

Petitioner bought the literary properties in question from William N. Selig in 1937 and sold them in 1945. During that eight-year period he never consummated a sale of any of them. While he testified that he and Bentel made efforts to sell various books and stories to some of the motion picture studios, when asked on cross-examination to name some of the prospects approached regarding their sale, he replied:

A. I don't know that I could specify with stories, to which studios. There were several stories involved, several books involved, and some of them were hot and some were cold. One in particular that was hot, that we though was sold, was a book called "Under Two Flags." I believe that was the title.

The book called "Under Two Flags," Mr. Bentel and I both believed that the sale—and I think the sale was to have been to RKO, we both believed the sale was in the bag. About that time another studio made a motion picture, which they titled "Under Two Flags," and it kayoed, or whatever you want to call it—it stopped our sale.

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(2) Other Taxpayers.—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer or $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets. If the tax is to be computed under Supplement T, "net income" as used in this paragraph shall be read as "adjusted gross income."

It is upon such evidence that the petitioner relies to show that he was engaged in trade or business with respect to the literary properties. We are satisfied on the record before us that petitioner's only business or occupation was that of radio commentator and newspaper columnist. He did not purchase the literary properties for use in that business. While it is true that an individual may engage in more than one business, he has not established that he did so. He made an investment in the literary properties with the hope or expectation of selling them at a profit. That hope or expectation was never realized during the period from 1937 to 1945. The only sale of any of these properties ever made by him was the sale in 1945 to one of his employees. He may have held them for sale, but not "primarily for sale to customers in the ordinary course of his trade or business." He did not or could not show any activity from which we can find that he engaged in a trade or business with respect to the literary properties. Neither did he show that these properties constituted stock in trade or property of a kind which would properly be included in inventory. See Section 22(c), Internal Revenue Code. The properties in which he invested were held by him for more than six months, and inasmuch as he has not proved that they fell within the types of property excluded from the term "capital assets" in Section 117(a)(1), the respondent did not err in determining that the loss sustained upon their sale was a loss from the sale of capital assets and subject to the provisions of Section 117

(b) and (d). Had petitioner sold the literary properties at a profit, he would no doubt have claimed that they were capital assets and that he would have been entitled to the favorable treatment accorded to capital gains. We think that these properties did constitute capital assets, and that petitioner must accept whatever tax disadvantages attach to such assets when they are sold at a loss.

Review by the Court.

Decision will be entered for the respondent.

Served September 25, 1953.

The Tax Court of the United States
Washington

Docket No. 27910

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated September 25, 1953, it is

Ordered and Decided: That there are deficiencies in income tax as follows.

Year	Deficiency
1944	$ 7,316.60
1945	10,293.79
1946	6,992.74

/s/ ARNOLD RAUM,
Judge.

Entered Sept. 29, 1953.

Served Sept. 30, 1953.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 27910

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

The petitioner and taxpayer in this cause, James M. Fidler, hereby petitions for a review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United

States rendered and entered in the above-entitled cause on September 29, 1953, 20 T.C. ...., No. 149, determining deficiencies in the petitioner's federal income taxes for the calendar years 1944, 1945 and 1946 in the respective amounts of $7,316.60, $10,293.79 and $6,992.74.

On January 31, 1950, the Commissioner of Internal Revenue mailed to the petitioner a notice of deficiencies in taxes for said years and statement. Within ninety days thereafter and on April 26, 1950, the petitioner filed a petition with The Tax Court of the United States for redetermination of said deficiencies in taxes under the provisions of Section 272 of the Internal Revenue Code. The decision of The Tax Court sustaining the deficiencies in taxes was entered on September 29, 1953.

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar years 1944, 1945 and 1946 and presents the following questions: (1) whether the petitioner was entitled to deduct alimony payments of $9,000, $9,600 and $9,600 made by petitioner to his divorced wife during the years 1944, 1945 and 1946, and (2) whether the petitioner was entitled to deduct in full a loss of $4,750 resulting from the sale by him in 1945 of certain books and manuscripts.

The petitioner is a resident of Los Angeles, California. The review from said decision is sought in the United States Court of Appeals for the Ninth

Circuit in which circuit is located the collector's office, namely, Collector of Internal Revenue for the Sixth District of California, Los Angeles, California, to which the petitioner made his federal income tax returns for the calendar years 1944, 1945 and 1946, and which are the returns in respect of which the deficiencies arise. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

Dated this 15th day of December, 1953.

/s/ RAYMOND C. SANDLER,

/s/ NELSON ROSEN,

Counsel for Petitioner,
James M. Fidler.

Affidavit of Service by Mail attached.

Filed December 18, 1953, T.C.U.S.

[Title of Court of Appeals and Cause.]

Tax Court Docket No. 27910

NOTICE OF FILING OF PETITION FOR REVIEW

To: Commissioner of Internal Revenue, Washington, D. C., and to Daniel A. Taylor, Esquire, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

Please Take Notice that the petitioner in the above-entitled matter, James M. Fidler, has filed with the Clerk of The Tax Court of the United States a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States rendered and entered in the above-entitled cause on September 29, 1953.

A copy of said Petition for Review is herewith attached and served upon you.

Dated this 15th day of December, 1953.

/s/ RAYMOND C. SANDLER,

/s/ NELSON ROSEN,

Counsel for Petitioner,
James M. Fidler.

Received and Filed December 18, 1953, T.C.U.S.

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E

RESPONDENT'S EXHIBIT E
Admitted in evidence February 5, 1952.

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

3C11985 **1944**

or fiscal year beginning ..., 1944, and ending ..., 1945

Do not write in these spaces

File Code 916

Serial No.

District 6-Calif
(Cashier's Stamp)
REC'D WITH REMITTANCE

95 JAN 15 1945
COLL. INT. REV.
6th DIST. CAL.

E TAX COURT OF THE U
DOCKET 2-29-19
ADMITTED IN EVIDENCE
Los Angeles, Calif.
FEB 5 - 1952
ITIONER'S
EXHIBIT E
POONDENT'S

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME James M. Fidler
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1759 N. Gower
(PLEASE PRINT. Street and number or rural route)

Hollywood (City or town, postal zone number) Calif. (State)

Social Security No. (if any)

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your exemptions

	NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name	James M. Fidler	x x x x x x x x x		
	Bobbie Fidler Jr.	Daughter		

INTERNAL REVENUE AGENT IN CHARGE RECEIVED OCT 15 1945

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Your income

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT
		$

Enter total here → $

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) ... 7958.41

4. If you received any other income, give details on page 3 and enter the total here ... 67815.67

5. Add amounts in items 2, 3, and 4, and enter the total here ... $ 75774.08

If item 5 includes income of both husband and wife, show husband's income here, $...; wife's income here, $...

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ... $ 38082.35

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2) ... $

(B) By payments on 1944 Declaration of Estimated Tax ... 28431.66

Enter total here → 28431.66

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ... $ 9650.69

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ... $

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☐

You filed a return for a prior year, what was the latest year? 1943

Which Collector's office was it sent? Los Angeles

Which Collector's office did you pay amount claimed in item 7 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1944? ("Yes" or "No")

If "Yes," write below:
Name of wife (or husband) ...

Collector's office to which sent ...

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Glenn Brownfield (Signature of person (other than taxpayer or agent) preparing return)

Jan. 13, 1945 (Date)

James M. Fidler (Signature of taxpayer) (Date)

(If this is a joint return of husband and wife, it must be signed by both)

Glenn Brownfield
904 Financial Center Bldg.
Los Angeles 14 TRinity 4171

(SEE TAX TABLE BELOW)

16-41888-1

16

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page 3

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)		4. Total amount received this year	
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3	
3. Remainder of your cost (line 1 less line 2)		6. Enter line 5, or 3 percent of line 1, whichever is greater	

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (itemize in Schedule G)	
4354 Clybourne Apartment House	$ 560.00	$ 264.53	$	$ 270.31	
	6435.00	1264.40	2643.26	3511.70	
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	$ 6995.00	$ 1528.93	$ 2643.26	$ 3782.01	959.20

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business _____; (2) business name _____)

1. Total receipts _____ $

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)

(Enter the letters "C," or "C or M," on line 2 and 8 if inventories are valued at either cost, or cost or market whichever is lower)

2. Inventory at beginning of year	$	
3. Merchandise bought for sale		
4. Labor		
5. Material and supplies		
6. Other costs (explain in Schedule G)		
7. Total of lines 2 to 6	$	
8. Less inventory at end of year		
9. Net cost of goods sold (line 7 less line 8)	$	
10. Gross profit (line 1 less line 9)	$	

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor"	$	
12. Interest on business indebtedness		
13. Taxes on business and business property		
14. Losses (explain in Schedule G)		
15. Bad debts arising from sales or services		
16. Depreciation, obsolescence and depletion (explain in Schedule F)		
17. Rent, repairs, and other expenses (explain in Schedule G)		
18. Amortization of emergency facilities (attach statement)		
19. Net operating loss deduction (attach statement)		
20. Total of lines 11 to 19	$	
21. Total of lines 9 and 20	See Separate Schedule "C"	
22. Net profit (or loss) (line 1 less line 21)		67025.48

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	849.39
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc.	Amount,	$
Name and address of estate or trust	Amount,	
Other sources (state nature)	Amount,	
Total		

Total income from above sources (Enter as item 4, page 1) $ 67815.67

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
		$			$

16—41002-1

2E

dule D (Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES
FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1944

Or fiscal year beginning _____, 1944, and ending _____, 1945

(See instructions on other side)

me of taxpayer James M. Fidler

ress 1759 N. Gower Hollywood, Calif.

(1) CAPITAL ASSETS

Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired (Mo. Day Year)	3. Date sold (Mo. Day Year)	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (column 4 plus column 7 less the sum of columns 5 and 6)	Gain or loss to be taken into account: 9. Percentage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
00 Long Bell	10/25/43							100	
		1/14/44	5886.60	5875.90			10.70	100	10.70
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									$ 10.70
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
ner. Snuff	4/10/39	3/14/44	$ 4170.66	6148.40	$	$	1977.74	50	$ 988.87
odyear	4/4/43	6/6/44	10858.13	9735.00			1118.13	50	559.07
exas Corp.	4/11/40	9/19/44	9510.86	9345.50			165.36	50	82.68
ner. Snuff	4/19/40	11/27/44	4306.12	6500.05			2193.93	50	1096.97
-4354	4/17/40	8/3/44	12500.00	9562.96		1628.51	4565.55	50	2282.78
bourne Ave.									
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									$ 838.69

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carry-over (attach statement)	3. Net gain or loss to be taken into account from column 10, above: (a) Gain	3. (b) Loss	4. Net gain or loss to be taken into account from partnerships and common trust funds: (a) Gain	4. (b) Loss	5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary: (a) Gain	5. (b) Loss
l net short-term capital gain or loss	$	$ 10.70		$	$	$ 10.70	
l net long-term capital gain or loss		$ 838.69		$	$	$ 838.69	
gain in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 3, Form 1040)						$ 849.39	x x x x x x
loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 3, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 2, Form 1040, computed without regard to capital gains or losses, or (3) $1,000, whichever is smallest)						x x x x x x	x $

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term *capital gain* over net short-term *capital loss*, and line 5, page 4, Form 1040, exceeds $16,000

income (line 3, page 4, Form 1040)	$ 63725.12	10. Normal tax (3% of line 9)	$ 1871.59
ess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above)	838.69		
inary net income (line 1 less line 2)	$ 62886.43	11. Partial tax (line 6 plus line 10)	$ 37663.01
n: Surtax exemptions (line 4, page 4, Form 1040)	1000.00	12. 50% of line 2	419.34
ance (surtax net income)	$ 61886.43		
tax on line 5. (See Surtax Table in Form 1040 instructions)	$ 35791.42	13. Alternative tax (line 11 plus line 12)	$ 38082.35
inary net income (line 3, above). (If partially tax-exempt interest is included, see Tax Computation instructions on page 4 of Form 1040 Instructions)	$ 62886.43	14. Total normal tax and surtax (line 6 plus line 10, page 4, Form 1040)	$ 38342.34
n: Normal-tax exemption (line 8, page 4, Form 1040)	500.00	15. Tax liability (line 13 or line 14, whichever is the lesser). (Enter on line 11, page 4, Form 1040)	$ 38082.35
ance subject to normal tax	$ 62386.43		

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 6 less the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss) (enter on line 2, Schedule D, page 3, Form 1040)						$

y Item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

16—41099-1

3E

James M. Fidler
1944 Income Tax—Los Angeles
Schedule "C"

Income:		
Radio program		$103,500.00
Syndicated column		9,304.80
Miscellaneous (sound tract)		1,000.00
		$113,804.80
Expense:		
Office	$ 4,579.42	
Automobile	692.63	
Social Security Tax paid on employees	463.33	
Publicity, entertainment, etc.	1,768.87	
Subscriptions to publications	137.09	
Columns and stories purchased from others	6,801.50	
Salaries of staff	18,766.48	
Attorney fees	2,320.00	
Agent	10,350.00	45,879.32
Net		$ 67,925.48

Schedule "G"

Other expense:		
Gardner	$ 153.10	
Water	33.57	
Manager—Apartment house	600.31	
Gardner—Apartment house	140.00	
Gas	378.65	
Water and electricity	742.19	
Miscellaneous	32.51	
Laundry	510.66	
Telephone	66.86	
Refrigerator service	72.00	
Cleaning	12.99	
Replacements	115.56	
Insurance	242.82	
Taxes	680.79	
Total	$ 3,782.01	
Repairs:		
Plumbing	$ 121.78	
Painting	2,500.00	
Electric	21.48	
Total	$ 2,643.26	

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or (2) Your total income is $5,000 or more and you claim the $500 standard deduction. If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

Page 4

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return		Amount
Contributions		
Childrens Home Society	$ 5.00	
" Hospital	10.00	
L.A. War Chest	250.00	
Christmas Seals	10.00	
Agusta Ga. Children's Home	200.00	
Salvation Army	10.00	
Allowable Contributions (not in excess of 15 percent of item 5, page 1)		$ 485.00
Interest		
	$	
Security First National Bank	30.03	
Total Interest		30.03
Taxes		
Automobile License	$ 9.90	
New Mexico R.E.	24.19	
California State Income Tax	1148.09	
Club Dues Tax	33.60	
L.A. County Real Estate Taxes	1240.85	
Sales Tax (Calif. State)	77.30	
Total Taxes		2533.93
Losses from fire, storm, shipwreck, or other casualty, or theft		
	$	
Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses		
	$	
Net Expenses (not compensated by insurance or otherwise)	$	
Enter 5 percent of item 5, page 1, and subtract from Net Expenses		
Allowable Medical and Dental Expenses. See Instruction for limitation		
Miscellaneous (including alimony, amortizable bond premium, special deduction for the blind, etc.)		
	$	
Alimony	9000.00	
Total Miscellaneous Deductions		9000.00
TOTAL DEDUCTIONS		$ 12048.96

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income		$ 75774.08
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)		12048.96
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income		$ 63725.12
4. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)		1000.00
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income		$ 62725.12
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here		$ 36445.59
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)		$ 63725.12
8. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)		500.00
9. Subtract line 8 from line 7, and enter the difference here		$ 63225.12
10. Enter here 3 percent of line 9. This is your Normal Tax		$ 1896.75
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)		$ 38082.34
If you used the $500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11		
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
13. Enter here any income tax paid at source on tax-free covenant bond interest		
14. Add the figures on lines 12 and 13 and enter the total here		
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		$ 38082.35

★ U. S. GOVERNMENT PRINTING OFFICE : 1944 16—43000-1

CE

RESPONDENT'S EXHIBIT F
Admitted in evidence February 5, 1952.

arch 15, 1946. Any balance of tax Instructions for filling out return.

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1945

90991345

or fiscal year beginning ..... 1945, and ending 1946

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2, as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

Do not write in these spaces
File Code
Serial No.
District 6-Cali
(Cashier's Stamp)

RECEIVED
MAR 15 1946
COLL. INT. REV.
LOS ANGELES, CA

NAME James M. Fidler
(PLEASE PRINT. If this return is for a husband and wife, use both first names)

ADDRESS 1759 N. Gower
(PLEASE PRINT. Street and number or rural route)

Hollywood 28 Los Angeles Calif.
(City or town, postal zone number) (County) (State)

Occupation Commentator & Columnist Social Security No. .....

THE TAX COURT OF THE UNITED STATES
DOCKET
ADMITTED IN EVIDENCE
Los Angeles, Calif.
FEB 5 - 1952
PETITIONER'S
EXHIBIT F
RESPONDENT'S

Your Exemptions

List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1945 income of less than $500 who received more than one-half of their support from you. If husband and wife file a joint return, list dependent relatives of both.

	Name (please print)	Relationship	Months in your home if not living with you	Contributions
1. Your name	James M. Fidler	x x x x x x x x x x		
	Bobbe Fidler Jr	Daughter		

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1945, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, ... Members of armed forces, and persons claiming travel or reimbursed expenses, see Instruction 2.

	Print Employer's Name	Where Employed (City and State)	Amount
2.	Wm. Morris Agency	Hollywood Calif	$ 1500.00

Enter total here → $ 1500.00

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) 9293.23

4. If you received any other income, give details on page 2 and enter the total here 63001.43

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ 73794.66

If item 5 includes incomes of both husband and wife, show husband's income here, $ ..... ; wife's income here, $ .....

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 4, or from line 15, page 3 ..... $ 35077.52

7. How much have you paid on your 1945 income tax?
(A) By withholding from your wages ..... $ 336.40
(B) By payments on 1945 Declaration of Estimated Tax 37331.23
Enter total here → 37667.63

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ..... $

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ..... $ 2590.11
Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1946 estimated tax ☑

If you filed a return for a prior year, what was the latest year? 1944

To which Collector's office was it sent? Los Angeles

To which Collector's office did you pay amount claimed in item 7 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1945? ..... ("Yes" or "No")
If "Yes," write below:
Name of wife (or husband) .....

Collector's office to which sent .....

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief it is true, correct, and complete return.

Glenn Brownfield 3/9/46
(Signature of person (other than taxpayer or agent) preparing return) (Date)

Glenn Brownfield 902 Financial Center Bldg.
(Name of firm or employer, if any)

Los Angeles 14, Calif.

James M. Fidler 3/9/46
(Signature of taxpayer) (Date)

(If this is a joint return of husband and wife, it must be signed by both)

16—68797-2

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Page

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	$	4. Total amount received this year	$	
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3		
3. Remainder of your cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater (Attach separate schedule for each additional annuity or pension)		$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (Itemize in Schedule G)	
	$	$	$	$	
Apartment house					
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	6620.00	1264.40	1004.06	2962.18	1389.36
	$	$	$	$	

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business Commentator and Columnist (2) business name

See Schedule C Attached)

1. Total receipts			$
COST OF GOODS SOLD (To be used where inventories are an income-determining factor) (Enter the letters "C," or "C or M" on lines 2 and 8 if inventories are valued at either cost, or cost or market, whichever is lower)		OTHER BUSINESS DEDUCTIONS	
2. Inventory at beginning of year	$	11. Salaries and wages not in line 4	$
3. Merchandise bought for sale		12. Interest on business indebtedness	
4. Labor		13. Taxes on business and business property	
5. Material and supplies		14. Losses (explain in Schedule G)	
6. Other costs (explain in Schedule G)		15. Bad debts arising from sales or services	
7. Total of lines 2 to 6	$	16. Depreciation, obsolescence and depletion (explain in Schedule F)	
8. Less inventory at end of year		17. Rent, repairs, and other expenses (explain in Schedule G)	
9. Net cost of goods sold (line 7 less line 8)	$	18. Amortization of emergency facilities (attach statement)	
		19. Net operating loss deduction (attach statement)	
		20. Total of lines 11 to 19	$
		21. Total of lines 9 and 20	$
10. Gross profit (line 1 less line 9)	$	22. Net profit (or loss) (line 1 less line 21)	65361.36

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D)	1000.71
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)	4750.00

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

Name and address of partnership, syndicate, etc	Amount,	$
Name and address of estate or trust	Amount,	
Other sources (state nature)	Amount,	
Total		

Total income from above sources (Enter as item 4, page 1) $ 63001.43

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accounting for depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		$	$	$	$			$
See attached schedule								

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
	see attached schedule	$			$

16—40739-1

James M. Fidler
1945 Income Tax—Los Angeles
Schedule C

Income:		
Radio program		$ 93,750.00
Syndicated column		14,540.91
Miscellaneous		75.00
Total		$108,365.91
Expense:		
Office	$ 4,795.44	
Automobile	369.06	
Social Security Taxes	621.66	
Publicity and entertainment	1,889.55	
Subscriptions and dues	189.65	
Columns and stories purchased	5,540.00	
Salaries	28,054.23	
Attorney fees	1,320.00	
Agent's commission	225.00	43,004.59
Net		$ 65,361.32

Schedule G

Other Expense:		
Apartment house manager	$ 540.00	
Gardner	110.00	
Gas	306.92	
Water and electricity	810.89	
Laundry	326.55	
Supplies	136.43	
Telephone	84.38	
Refrigeration service	72.00	
Miscellaneous	60.51	
Insurance	79.50	
Taxes	435.00	
Total	$ 2,962.18	
Repairs:		
Electric	$ 29.90	
Painting	818.00	
Plumbing	89.61	
Miscellaneous	66.55	
Total	$ 1,004.06	

Schedule H

Contributions:

Youth of America	$ 2.00	
Orphan's Home—Augusta, Ga.	543.28	
Crippled Children's Society	10.00	
American Legion Rehabilitation	5.00	
Kala-Ruth Service Club	2.00	
American Red Cross	100.00	
Hollywood Children's Hospital	10.00	
L. A. Community Chest	250.00	
Charity Show	11.51	
Christmas Seals	5.00	
Kenny Foundation	25.00	
		$ 963.79

chedule D (Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES

FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1945

Or fiscal year beginning ....., 1945, and ending ....., 1946

(See instructions on other side)

Name of taxpayer James M. Fidler

Address 1759 N. Gower St. Hollywood 28, California

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (column 4 plus column 7 less the sum of columns 5 and 6)	Gain or loss to be taken into account: 9. Percentage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
Bad Debts									
Wm. K. Howard	12/5/44	12/31/45	.00	500.00			500.00	100	500.00
Boo Hoss	5/31/38	"	.00	290.00			290.00	100	290.00
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									790.00
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
rsonal Res.	1927	7/28/45	56652.35	56865.23			212.88	50	.00
) Ches.& Ohio	6/6/44	12/31/45	11008.69	9171.78			1836.91	50	918.45
00 Gen. Elec	11/2/42	12/31/45	4664.65	2920.05			1744.60	50	872.30
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									1790.75

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carry-over (attach statement)	3. Net gain or loss to be taken into account from column 10, above (a) Gain	3. (b) Loss	4. Net gain or loss to be taken into account from partnerships and common trust funds (a) Gain	4. (b) Loss	5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary (a) Gain	5. (b) Loss
Total net short-term capital gain or loss			790.00				790.00
Total net long-term capital gain or loss		1790.75				1790.75	
Net gain in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 2, Form 1040)						1000.75	xxxxxx x
Net loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 2, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 4, Form 1040, computed without regard to capital gains or losses, or (3) $1,000, whichever is smallest)						xxxxxx x	

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term *capital gain* over net short-term *capital loss*, and line 9, page 3, Form 1040, exceeds $16,000

Net income (line 3, page 3, Form 1040)	60003.50	10. Surtax on line 9. (See Surtax Table in Form 1040 Instructions)	32822.06
Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above)	1000.75		
Ordinary net income (line 1 less line 2)	59002.75	11. Partial tax (line 6 plus line 10)	34577.14
Less: Normal-tax exemption (line 4, page 3, Form 1040)	500.00	12. 50% of line 2	500.38
Balance subject to normal tax. (If partially tax-exempt interest is included in line 3 above, see Tax Computation Instructions on page 4 of Form 1040 Instructions)	58502.75	13. Alternative tax (line 11 plus line 12)	35077.52
Normal tax (3% of line 5)	1755.08	14. Total normal tax and surtax (line 6 plus line 10, page 3, Form 1040)	35357.73
Ordinary net income (line 3, above)	59002.75	15. Tax liability (line 13 or line 14, whichever is the lesser). (Enter on line 11, page 3, Form 1040)	35077.52
Less: Surtax exemptions (line 8, page 3, Form 1040)	1000.00		
Balance (surtax net income)	58002.75		

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 6 less the sum of columns 4 and 5)
Seelig Library of books and MS.	7/26/37	250.00	5000.00			4750.00
Total net gain (or loss) (enter on line 2, Schedule D, page 2, Form 1040)						4750.00

If any item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

16—41030-3

4F

Do not itemize deductions if—(1) You determine your tax from the tax table on page 4, or (2) Your total income is $5,000 or more and you claim the $500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.		Amount
Contributions	see attached schedule	
	Allowable Contributions (not in excess of 15 percent of item 5, page 1)	$ 963.79
Interest		
	Total Interest	
Taxes	Real Estate and Personal Property(County) $ 507.09	
	Unemployment Insurance 15.00	
	State Income Tax 2705.28	
	Total Taxes	3227.37
Losses from fire, storm, shipwreck, or other casualty, or theft.		
	Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses		
	Net Expenses (not compensated by insurance or otherwise) $	
	Enter 5 percent of item 5, page 1, and subtract from Net Expenses	
	Allowable Medical and Dental Expenses. See Instruction for limitation	
Miscellaneous (See Instructions)	Alimony 9600.00	
	Total Miscellaneous Deductions	9600.00
	TOTAL DEDUCTIONS	$ 13791.16

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$ 73794.66	
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	13791.16	
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 60003.50	
4. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500.00	
5. Subtract line 4 from line 3. Enter the difference here. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$ 59503.50	
6. Enter here 3 percent of line 5. This is your Normal Tax. (Figure your Surtax below and enter in line 10)		$ 1785.11
7. Copy the figure you entered on line 3, above	$ 60003.50	
8. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	1000.00	
9. Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$ 59003.50	
10. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here		33572.62
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)		$ 35077.52
If you used the $500 standard deduction in line 2, disregard lines 12, 13, and 14, and copy on line 15 the same figure you entered on line 11		
12. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
13. Enter here any income tax paid at source on tax-free covenant bond interest		
14. Add the figures on lines 12 and 13 and enter the total here		
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		$ 35077.52

OF

RESPONDENT'S EXHIBIT G
Admitted in evidence February 5, 1952.

47. Any balance of tax ... ons for filing out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

G.

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1946

3056288 1946

or fiscal year beginning ..... 1946, and ending 1947

Do not write in these spaces
File No. 9 1 6
Serial No.
District 6-Calif

THE TAX COURT OF THE U.S.
DIV. 11 DOCKET 7916
ADMITTED IN EVIDENCE
Los Angeles, Calif
FEB 5 - 1952
PETITIONER'S EXHIBIT G
RESPONDENT'S

DEC 26 1947 INTERNAL REVENUE

MAR 15 1947

EMPLOYEES.—Instead of this form, you may use your Withholding Statement, Form W-... return, if your total income was less than $5,000, consisting wholly of wages shown on ... Statements or of such wages and not more than $100 of other wages, dividends, ... interest.

Name JAMES M. FIDLER
(PLEASE PRINT. If this return is for a husband and wife, use both ...)

ADDRESS 1759 NO. GOWER STREET
(PLEASE PRINT. Street and number or rural route)

HOLLYWOOD 28 (City or town, postal zone number) LOS ANGELES (County) CALIFORNIA (State)

Occupation Commentator & Columnist Social Security No.

Your Exemptions

List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in Instruction 1) with 1946 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)	Relationship	Name (please print)	Relationship
Your name James M. Fidler	x x x x x x x		
Bobbe Fidler	daughter		

Your Income

Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1946, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming travelling or reimbursed expenses, see Instruction 2.

2. Print Employer's Name	Where Employed (City and State)	Amount	
		$	

Enter total here → $

3. Enter here the total amount of your dividends ... Earned abroad $ 10,410.00		1,041 00
4. Enter here the total amount of your interest (including interest from Government obligations unless wholly exempt from taxation)		28 18
5. If you received any other income, give details on page 2 and enter the total here		69,466 51
6. Add amounts in items 2, 3, 4, and 5, and enter the total here ... 70,535.69		$ 79,904 69

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 3. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

7. Enter your tax from table on page 4, or from line 12, page 3		$ 35,711 11
8. How much have you paid on your 1946 income tax?		
(A) By withholding from your wages	$	
(B) By payments on 1946 Declaration of Estimated Tax ... 32,715 87		ok. 32,715 87
Enter total here →		
9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here		$ 2,995 24
10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here		$

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1947 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1945
To which Collector's office was it sent? Los Angeles
To which Collector's office did you pay amount claimed in item 8 (B), above? Los Angeles

Is your wife (or husband) making a separate return for 1946? ("Yes" or "No")
If "Yes," write below:
Name of wife (or husband)
Collector's office to which sent

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Glenn Brownfield (Signature of person (other than taxpayer or agent) preparing return) 3/12/47 (Date)
Glenn Brownfield
901 Financial Center Bldg.,
Los Angeles 14 TRinity 4171

James M. Fidler (Signature of taxpayer) (Date)
(If this is a joint return of husband and wife, it must be signed by both)

16—40284-1

Do not use this page if your income is wholly from salaries, wages, dividends, and interest

Schedule A.—INCOME FROM ANNUITIES OR PENSIONS

1. Cost of annuity (total amount you paid in)	$	4. Total amount received this year	$	
2. Amount received tax-free in prior years		5. Excess, if any, of line 4 over line 3		
3. Remainder of your cost (line 1 less line 2)	$	6. Enter line 5, or 3 percent of line 1, whichever is greater (Attach separate schedule for each additional annuity or pension)		$

Schedule B.—INCOME FROM RENTS AND ROYALTIES

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (Taxes, in Schedule G)	
Apartment House	$ 6,557 50	$ 1,264 40	$ 205 69	$ 4,108 32	
Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5)	$ 6,557 50	$ 1,264 40	$ 205 69	$ 4,108 34	979 07

Schedule C.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (Farmers should obtain Form 1040F)

(State (1) nature of business ; (2) business name)

1. Total receipts See SCHEDULE "C" Attached $

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)
(Enter the letters "C" or "C or M" on lines 2 and 6 if inventories are valued at either cost, or cost or market, whichever is lower)

2. Inventory at beginning of year $
3. Merchandise bought for sale
4. Labor
5. Material and supplies
6. Other costs (explain in Schedule G)
7. Total of lines 2 to 6 $
8. Less inventory at end of year
9. Net cost of goods sold (line 7 less line 8) $
10. Gross profit (line 1 less line 9) $

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not in line 4 $
12. Interest on business indebtedness
13. Taxes on business and business property
14. Losses (explain in Schedule G)
15. Bad debts arising from sales or services
16. Depreciation, obsolescence and depletion (explain in Schedule F)
17. Rent, repairs, and other expenses (explain in Schedule G)
18. Amortization of emergency facilities (attach statement)
19. Net operating loss deduction (attach statement)
20. Total of lines 11 to 19 $
21. Total of lines 9 and 20 $
22. Net profit (or loss) (line 1 less line 21) 66,311 76

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

1. Net gain (or loss) from sale or exchange of capital assets (from separate Schedule D) 2,175 68
2. Net gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

1. Name and address of partnership, syndicate, etc. Amount, $
2. Name and address of estate or trust Amount,
3. Other sources (state nature) Amount,
4. Total

Total income from above sources (Enter as item 5, page 1) $ 69,466 51

Schedule F.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES B AND C

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Apartment House	1927	$ 24357 00	$	$ 21,927 70	$ 26429 30	40	21	$ 1,264 40

Schedule G.—EXPLANATION OF COLUMNS 4 AND 5 OF SCHEDULE B, AND LINES 6, 14, AND 17 OF SCHEDULE C

1. Column or Line No.	2. Explanation	3. Amount	1. Column or Line No.	2. Explanation	3. Amount
	See attached SCHEDULE	$			$

16—40554-1 ★ GPO

Schedule D (Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1946

Or fiscal year beginning _____, 1946, and ending _____, 1947

(See instructions on other side)

Name of taxpayer JAMES M. FIDLER

Address 1759 NO. GOWER STREET, HOLLYWOOD 28, CALIFORNIA

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach statement of descriptive details not shown below)	2. Date acquired (Mo. Day Year)	3. Date sold (Mo. Day Year)	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (column 4 plus column 7 less the sum of columns 5 and 6)	Gain or loss to be taken into account: 9. Percentage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS									
								100	
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS									
100 Decca	8/8/44	5/14/46	7311 31	2959 94			4351 37	50	2175 68
								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								50	2175 68

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carry-over (attach statement)	3. Net gain or loss to be taken into account from column 10, above: (a) Gain	3. (b) Loss	4. Net gain or loss to be taken into account from partnerships and common trust funds: (a) Gain	4. (b) Loss	5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary: (a) Gain	5. (b) Loss
1. Total net short-term capital gain or loss							
2. Total net long-term capital gain or loss		2175 68				2175 68	
3. Net gain in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 2, Form 1040)						2175 68	XXXXXX
4. Net loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 2, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 4, Form 1040, computed without regard to capital gains or losses, or (3) $1,000, whichever is smallest)						XXXXXX	

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term *capital gain* over net short-term *capital loss*, and line 5, page 3, Form 1040, exceeds $18,000

1. Net income (line 3, page 3, Form 1040)	65,900 75	6. Combined tentative normal tax and surtax on amount on line 5. (See Tax Computation Instructions on page 4 of Form 1040 Instructions)	36,445 55
2. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above)	2,175 68	7. Less: 5 percent of line 6	1,822 28
3. Ordinary net income (line 1 less line 2)	63,725 07	8. Partial tax (line 6 less line 7)	34,623 27
4. Less: Exemptions (line 4, page 3, Form 1040)	1,000 00	9. 50 percent of line 2	1,087 84
5. Balance	62,725 07	10. Alternative tax (line 8 plus line 9)	35,711 11 ✓
		11. Total normal tax and surtax (line 8, page 3, Form 1040)	36,235 46
		12. Tax liability (line 10 or line 11, whichever is the lesser). (Enter on line 8, page 3, Form 1040)	35,711 11 X

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 6 less the sum of columns 4 and 5)
Total net gain (or loss) (enter on line 2, Schedule D, page 2, Form 1040)						

If any item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

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James M. Fidler
1946 Income Tax—Los Angeles, Calif.
Schedule "C"

Income:		
Radio program		$ 96,800.00
Syndicated column		11,800.00
Dell Publishing Company		4,200.00
Guest—Radio program		500.00
Total		$113,300.00
Expense:		
Office	$ 3,866.52	
Auto	262.77	
Social Security Taxes	907.18	
Publicity and promotion	1,273.54	
Travel expense—Guest appearances	553.84	
Subscriptions	190.43	
Insurance—Libel, Workmen's Comp., etc.	944.79	
Columns and stories purchased	4,107.50	
Salaries	33,456.67	
Attorney fees	1,425.00	
Total		46,988.24
Net from business		$ 66,311.76

Schedule "H"

Contributions:	
Red Cross	$ 100.00
Community Chest	250.00
Augusta, Georgia, Children's Home	200.00
Children's Home Society	10.00
Children's Hospital	25.00
Christmas Seal Fund	10.00
Total	$ 595.00

Schedule "G"

Other Expenses:

Manager	$	565.00
Gardner		140.00
Gas		355.84
Electricity		872.18
Laundry		291.64
Supplies		10.13
Telephone		109.68
Refrigeration Service		27.52
Dishes, linoleum, linens, etc. (Replacements)		903.01
City permits and taxes		680.44
Insurance		152.90
Total	$	4,108.34

Repairs:

Plumbing	$	119.27
Electric		33.14
Mattresses		25.38
Miscellaneous		27.90
Total	$	205.69

Do not itemize deductions if—(1) You determine your tax from the tax table on page 4, or
(2) Your total income is $5,000 or more and you claim the $500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

		Amount
Contributions	See SCHEDULE "H" attached	
	Allowable Contributions (not in excess of 15 percent of item 6, page 1)	$ 595 00
Interest	Security First National Bank — $ 497 37	
	Total Interest	497 37
Taxes	California State Income Tax — $ 2,536 06 Real Estate & Personal Prop. County Tax — 775 51	
	Total Taxes	3,311 57
Losses from fire, storm, shipwreck, or other casualty, or theft.		
	Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses		
	Net Expenses (not compensated by insurance or otherwise) — $	
	Enter 5 percent of item 6, page 1, and subtract from Net Expenses	
	Allowable Medical and Dental Expenses. See Instruction for limitation	
Miscellaneous (See Instructions)	Alimony — $ 9,600 00	
	Total Miscellaneous Deductions	9,600 00
	TOTAL DEDUCTIONS	$ 14,003 94

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 6, page 1. This is your Adjusted Gross Income	$ 79,904 69 X
2. Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	14,003 94 ✓
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 65,900 75
4. Enter your exemptions ($500 for each person whose name is listed in item 1, page 1)	1,000 00 ✓
5. Subtract line 4 from line 3. Enter the difference here	$ 64,900 75
6. Use the tax rates in instruction sheet to figure your combined tentative normal tax and surtax on amount entered on line 5. Enter the tentative tax here. (If line 3 above includes partially tax-exempt interest, see Tax Computation Instructions)	$ 38,142 59 ✓ 1,907 13 ✓
7. Enter here 5 percent of amount entered on line 6	
8. Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax. (If alternative tax computation is made on separate Schedule D, enter here tax from line 12 of Schedule D)	$ 36,235 46
IF YOU USED THE $500 STANDARD DEDUCTION IN LINE 2, DISREGARD LINES 9, 10, AND 11, AND COPY ON LINE 12 THE SAME FIGURE YOU ENTERED ON LINE 8.	
9. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116) — $	
10. Enter here any income tax paid at source on tax-free covenant bond interest	
11. Add the figures on lines 9 and 10 and enter the total here	$
12. Subtract line 11 from line 8. Enter the difference here and in item 7, page 1. This is your tax	

16—69254-1

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review" in the proceeding before The Tax Court of the United States entitled "James M. Fidler, Petitioner, v. Commissioner of Internal Revenue, Respondent, Docket No. 27910" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 7th day of January, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court
of the United States.

[Endorsed]: No. 14204. United States Court of Appeals for the Ninth Circuit. James M. Fidler, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed January 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 14,204

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS AND DESIGNATION OF RECORD TO BE PRINTED

Comes now James M. Fidler, the petitioner herein, by his counsel, and states that the following are the points on which he intends to rely in connection with his petition for a review by the above-entitled Court of the decision of The Tax Court of the United States rendered on September 29, 1953:

1. The Tax Court erred in deciding that payments in the amounts of $9,000, $9,600 and $9,600 made by petitioner to his divorced wife during the years 1944, 1945 and 1946 constituted "installment payments" within the meaning of Section 22(k) of the Internal Revenue Code and were not deductible by petitioner under the provisions of Section 23(u) of the Internal Revenue Code.

2. The Tax Court erred in deciding that the loss sustained by petitioner in the calendar year 1945 in the amount of $4,750 from the sale of books and manuscripts constituted a loss from the sale of

capital assets held for more than six months and subject to the provisions of Section 117(b) and (d) of the Internal Revenue Code and in failing to decide that the loss was an ordinary business loss deductible in full under the provisions of Section 23(e).

3. The Tax Court erred in entering its decision wherein it ordered and decided that there are deficiencies in income tax of petitioner as follows:

Year	Deficiency
1944	$ 7,316.60
1945	10,293.79
1946	6,992.74

Petitioner states that the entire record is material to the consideration of his petition for review, and therefore hereby designates for printing the entire certified transcript of record which the Clerk of The Tax Court of the United States has caused to be filed in the above-entitled Court.

Dated this 22nd day of January, 1954.

/s/ RAYMOND C. SANDLER,

/s/ NELSON ROSEN,
Counsel for Petitioner,
James M. Fidler.

[Endorsed]: Filed January 23, 1954, U.S.C.A.

No. 14204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
6253 Hollywood Boulevard,
Los Angeles 28, California,

W. I. GILBERT, JR.,
458 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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I.

The payments made by petitioner to Ruth Fidler of the sums of $800.00 each month during the period from April 1, 1944, to December 31, 1946, for her support and maintenance constituted periodic payments within the provisions of Section 22(k) of the Internal Revenue Code, and were therefore deductible by petitioner under the terms of Section 23(u) 20

II.

The loss which petitioner sustained in 1945 upon the sale of the stock of literary properties was an ordinary business loss, deductible in full under the provisions of Section 23(e). The literary properties did not constitute "capital assets," but to the contrary, fell within those types of property expressly excluded from "capital assets" by Section 117(a)(1), i.e., "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" 58

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House Report No. 2233, Committee on Ways and Means, 77th Cong., 2d Sess., C. B. 1942-2, pp. 409, 427 ..... 21, 22, 28

Regulation 103, Sec. 19-22(k)-1 (TD 5194, CB 1942-2, p. 56, supar. (c), Example (1)) 28

Senate Report No. 163, Committee on Finance, 77th Cong., 2d Sess., C. B. 1942-2, p. 568 21

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No. 14204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF FOR PETITIONER.

Jurisdictional Statement.

This petition for review [R. 151-153] involves deficiencies in federal income taxes for the calendar years 1944, 1945 and 1946 in the respective amounts of $7,316.60, $10,293.79 and $6,992.74 [R. 150-151]. On January 31, 1950, the Commissioner of Internal Revenue mailed to the taxpayer-petitioner a notice of deficiency in taxes for said years and statement [R. 14-20]. Within ninety days thereafter and on April 26, 1950, the petitioner filed a petition with the Tax Court of the United States for the redetermination of said deficiencies in taxes under the provisions of Section 272 of the Internal Revenue Code [R. 6-20]. The decision of the Tax Court sustaining the deficiencies in taxes was entered on Sep-

tember 29, 1953 [R. 151]. The proceeding is brought to this Court by petition for review filed December 18, 1953 [R. 151-153], pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

Opinion Below.

The opinion of the Tax Court, promulgated September 25, 1953, is reported as 20 T. C. No. 149.

Statement of the Case.

Two questions are presented for decision:

First: Did payments in the sum of $800.00 per month which petitioner made during the period from April 1, 1944 through December 31, 1946, to his former wife, Ruth Law Fidler, as alimony and for her support and maintenance subsequent to a decree of divorce rendered on March 20, 1944, constitute periodic payments within the purview of Section 22(k) of the Internal Revenue Code, so as to entitle petitioner to deduct such payments pursuant to Section 23(u) in his income tax returns for the years 1944, 1945 and 1946?

Second: Did a loss in the sum of $4,750.00 which petitioner sustained in 1945 when he sold for the sum of $250.00 a stock of literary properties which he had purchased in 1937 for the sum of $5,000.00 represent an ordinary loss which he was entitled to deduct in full under Section 23(e) of the Internal Revenue Code, or did such loss constitute one from the sale of a capital asset held for more than six months, and which was therefore subject to the limitations of Section 117(b) and (d) of the Internal Revenue Code?

The facts in the case are stated below substantially as they appear in the decision of the Tax Court [R. 124-140]:

Petitioner is a resident of Los Angeles, California. He filed his income tax returns for the calendar years 1944, 1945 and 1946 with the collector of internal revenue for the sixth district of California at Los Angeles.

In 1936 petitioner was married to Ruth Law Fidler, sometimes known as Roberta Law Fidler and Roberta L. Fidler (hereinafter referred to as "Ruth Fidler").

There was no issue of this marriage, and in 1942 petitioner and Ruth Fidler adopted a newly-born baby girl.

Thereafter, petitioner and Ruth Fidler became separated, and on August 20, 1943, they entered into a written agreement which provided, among other things, that petitioner should have the exclusive custody and control of the minor child, subject to Ruth Fidler's right to reasonable visitation; that upon the execution of the agreement, Ruth Fidler should receive, as her share and in full division of the property of the parties, a certain Packard automobile and $20,000.00 in cash or securities; and that, in addition thereto, petitioner would pay to Ruth Fidler, in full and final payment for her support, maintenance and alimony, the sum of $30,000.00 in monthly installments of $500.00 per month, commencing on September 1, 1943. Petitioner's obligation to make such payments at the rate of $500.00 per month to Ruth Fidler for her support and maintenance was evidenced by two promissory notes executed by petitioner and delivered to her, concurrently with the execution of said agreement, and the terms of the notes were set forth in

full in said agreement. One of the notes provided for the payment to Ruth Fidler of the sum of $18,000.00, payable in consecutive, monthly installments of $500.00 per month commencing on September 1, 1943. The second note provided for the payment of the sum of $12,000.00, payable in consecutive, monthly installments of $500.00 per month, commencing on October 1, 1946. Each note contained a provision that in the event petitioner defaulted in the payment of any installment when due, the whole note might become immediately due and payable at the option of Ruth Fidler or the holder thereof, and that should suit be commenced to enforce payment of the note, petitioner would pay such additional sums as attorney's fees as the Court might adjudge to be reasonable. The $12,000.00 note, only, contained the following additional provision:

> "This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, for the support and maintenance of the payee. This note shall become absolutely void and of no effect upon any remarriage of the payee and whether or not such remarriage shall be valid."

The agreement of August 20, 1943, was prepared by a firm of Los Angeles attorneys who represented Ruth Fidler.

On October 21, 1943, an amendment to the agreement of August 20th was executed by petitioner and Ruth Fidler, the effect of which was to eliminate the provision above-quoted appearing in the $12,000.00 note, and Ruth Fidler acknowledged receipt of the $12,000.00 note, as thus amended, and also the $18,000.00 note above referred to.

On December 16, 1943, the aforesaid agreement was again supplemented and amended to provide, in effect, that Ruth Fidler should have exclusive custody and control of the minor child of the parties for a period of six months during each year and that petitioner should have the exclusive custody and control of the child for a like period of six months during each year; and that during such times as Ruth Fidler should have the custody and control of the child petitioner would pay the costs of a nurse, food, clothing and medical expense for the child.

On February 4, 1944, the petitioner and Ruth Fidler entered into a new agreement, which superseded their previous agreements. This new agreement also made provision for the custody and support of the minor child of the parties, and settled all rights and claims in respect of property and support between the parties. It, in substance, provided among other things that each of the parties should have the exclusive custody and control of their minor child for six months during each year, and that petitioner would pay to Ruth Fidler for the care, support and maintenance of the child during the period that she should have its custody and control the sum of $200.00 per month as well as any extraordinary medical care and attention required for the child; that in addition to the Packard automobile and $20,000.00 in cash or securities theretofore transferred by petitioner to Ruth Fidler as her share of and in full division of the property of the parties, petitioner agreed to and did transfer to her an additional sum of $7,000.00 in cash or securities. In addition to the foregoing, and with respect to alimony,

support and maintenance for Ruth Fidler, the agreement provided as follows:

> "SEVENTH: In addition to the foregoing, and on account of full and final payment of maintenance and support, alimony and alimony *pendente lite* to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party does hereby re-deliver to Second Party, and Second Party will retain, those two (2) certain promissory notes, being the same notes described in Paragraph First of Amendment to Agreement of August 20, 1943, in words and figures as follows, to-wit: * * *"

After setting forth, verbatim, the terms of the two promissory notes hereinbefore referred to, as amended on October 21, 1943, the agreement went on to provide for additional payments in the form of a third promissory note as follows:

> "In addition to the foregoing and in full and final payment of maintenance and support, alimony and alimony *pendente lite* to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party will, upon the execution of the within instrument, make, execute and deliver unto Second Party one (1) promissory note, in words and figures as follows, to-wit:
>
> $16,200.00 Los Angeles, California
> February 4, 1944
>
> At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only at Los Angeles, California, the sum of Sixteen Thousand, Two Hundred ($16,200.00) Dollars, without interest. Principal payable in lawful money of the

United States. This note is payable in installments of Three Hundred ($300.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of March, 1944, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

"This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, on account of the support and maintenance of the payee. Should payor, at any time during the term hereof, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, the monthly installments falling due hereunder during said periods shall be reduced in proportion to the amount of the reduction of his present radio contract, and should payor have no radio contract at all, then all monthly installments falling due hereunder during said period, shall be waived by payee, and payor shall not be required at any future time to pay the balance of any reduced, or waived payment, hereunder.

JAMES M. FIDLER
James M. Fidler
4362 Clayborn Avenue
Burbank, California.

"That Second Party accepts said three (3) promissory notes, for her support and maintenance and not

in lieu of property rights, upon the following conditions:

(a) In lieu of other provision for the support and maintenance of Second Party during her natural life;

(b) In full payment, discharge and satisfaction of all obligations or any thereof, on the part of First Party to maintain or support Second Party during her natural life;

(c) In full payment, discharge and satisfaction of counsel fees and costs in any pending or future action between the parties hereto, other than an action on said or any of said promissory notes.

"EIGHTH: That the installment payments provided in the three (3) promissory notes hereinabove set forth, being taxable to her as income, Second Party will, from and after the date hereof, file such income tax returns and/or declarations, both Federal and State, as are required by law, and will include therein all such support and maintenance payments received by her, and will pay all taxes shown to be due and payable under such returns and/or declarations.

"Should any of the monthly installments provided for in the said $16,200.00 promissory note, last above described, be reduced or waived and the payor not be required to make same, First Party will give to second Party, not for her support and maintenance, but as an absolute gift without condition, sufficient moneys to enable Second Party to pay her income taxes, both Federal and State, when due, on support and maintenance payments received from First Party, but not on income received by Second Party in excess thereof, without resort to the support and main-

tenance payments provided for in the two other promissory notes, above described, it being the intention of the parties hereto that Second Party will, during any period that the payments under said promissory note last above described are reduced or waived, have a net minimum sum of $500.00 per month for her support and maintenance."

In the preparation and execution of the agreement of February 4, 1944, petitioner and Ruth Fidler were each represented by attorneys of Los Angeles, California.

At the time of the execution of the agreement and for seceral years prior thereto, petitioner's principal business or occupation was that of radio commentator and newspaper columnist.

The "present radio contract" referred to in the agreement of February 4, 1944 (and in the amended decree of divorce hereinafter referred to) was a contract which was in force on February 4, 1944, and March 20, 1944, between petitioner and the sponsor of a weekly radio broadcast program under which petitioner was engaged to render his services as a commentator and reporter on said weekly radio program. The term of the radio contract was 26 weeks. The sponsor, however, had the option to renew and extend the contract of employment for additional, successive terms of 26 weeks' duration.

In 1944 Ruth Fidler, as plaintiff, instituted an action in the District Court of the State of Nevada in the County of White Pine against petitioner, as defendant, wherein she prayed that she be granted a divorce from petitioner and that the agreement of settlement and separation aforesaid of February 4, 1944, be approved by the Court.

Ruth Fidler was represented in said action by a firm of attorneys of Las Vegas, Nevada.

Petitioner never personally appeared in the Nevada divorce action, but authorized an attorney of Ely, Nevada, to appear for him.

The divorce action was tried at Ely, Nevada, on March 20, 1944, and a decree of divorce was rendered in favor of Ruth Fidler against petitioner.

The formal decree of divorce as signed by the judge of the Court adjudged and ordered as follows:

> "Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the marriage relationship now and heretofore existing between plaintiff and defendant be and the same is hereby dissolved and the parties are restored to the status of single persons.
>
> "It Is Further Ordered, Adjudged and Decreed that that certain Settlement Agreement entered into between the parties, dated February 4, 1944, be and the same is hereby confirmed, ratified, approved and adopted as a part of this Decree.
>
> "It Is Further Ordered, Adjudged and Decreed that the defendant herein have the care, custody and control of the minor child, named Bobbe Fidler, Jr., until October 1, 1944, and thereafter the plaintiff is to have the custody of the child for the next ensuing six months, or until April 1, 1945; thereafter the custody of said child shall be distributed to the parties for six months each, until further order of this Court; that during the term plaintiff has custody of the said minor child, defendant shall pay to her for the care, support and maintenance of said child, the sum of Two Hundred ($200.00) Dollars per month.

"It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

"The Court herewith retains jurisdiction herein with reference to the said minor child for the purpose of making such orders as may hereafter appear to best serve the interest of said minor child.

"Dated and Done this 20th day of March, 1944.

HARRY M. WATSON,
District Judge."

The decree was inconsistent and ambiguous, in that while it "confirmed, ratified, approved and adopted as a part" of it the settlement agreement entered into between petitioner and Ruth Fidler on February 4, 1944, and ordered petitioner to make payments to Ruth Fidler "in accordance with the terms of said Settlement Agreement," it also provided that such payments should be "the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years."

When the Los Angeles attorney who had represented petitioner in the preparation of the settlement agreement of February 4, 1944, received a copy of the above decree, he immediately noted the inconsistency of its provisions and communicated with Ruth Fidler's attorneys in Las Vegas, Nevada, concerning it, and suggested that the decree be amended to reflect correctly the terms of the settlement agreement.

The inconsistency in the decree was due to inadvertence, and Ruth Fidler's attorneys agreed that the decree should be amended. A form of amended decree was prepared, and on September 11, 1944, Ruth Fidler's attorneys sent such form of amended decree to the attorney at Ely, Nevada, who had appeared for petitioner in the divorce action, and requested him to present the proposed amended decree to the court.

Thereafter, on September 18, 1944, upon application of the attorney the Court ordered that the decree of divorce be amended to recite correctly the terms and provisions of the agreement of settlement between petitioner and Ruth Fidler.

An amended decree, as filed on November 16, 1944, contained the exact terms and language as set forth in the original decree above-quoted except that the following paragraph was deleted:

> "It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years."

And in lieu thereof the following paragraphs were substituted:

> "It Is Further Ordered, Adjudged and Decreed that defendant shall pay to plaintiff in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any

time before August 1, 1948, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract, and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder.

"It Is Further Ordered, Adjudged and Decreed, that all executory provisions of said Settlement Agreement which are not incorporated in this Decree in a plenary manner, are hereby declared to be binding on the respective parties hereto, and each of said parties is hereby ordered to do and perform all acts and obligations required to be done or performed by said executory provisions of said Settlement Agreement."

The amended decree was dated and signed by the same judge who had tried the divorce action and signed the original decree, in the following fashion:

"Dated and Done this 20th day of March, 1944.

/s/ Harry M. Watson,

District Judge."

On and prior to March 20, 1944, petitioner had paid and transferred to Ruth Fidler all moneys and properties

due to her under the terms of the settlement agreement of February 4, 1944, and paid certain sums required to be paid to her attorneys for representing her, and had made all payments to her which had then become due and payable to her pursuant to the terms of the promissory notes referred to and described in the agreement. After March 20, 1944, and during the years 1944, 1945 and 1946, petitioner also paid Ruth Fidler all sums which he was obligated to pay to her under the terms of the settlement agreement and the decree of divorce for the care, support and maintenance of the minor child of the parties. In addition to the foregoing, petitioner, pursuant to the terms of the agreement and decree, paid to Ruth Fidler as alimony and for her support and maintenance the sum of $800.00 each month during the period commencing April 1, 1944, and ending December 31, 1946.

The divorce decree as amended remained in full force and effect during the years 1945 and 1946.

During the period from February 4, 1944, to December 31, 1946, the sponsor of the weekly radio broadcast program hereinbefore referred to, to whom petitioner was under contract on February 4, and March 20, 1944, exercised its option to renew and extend said contract with the result that petitioner was continuously employed by this sponsor during this period and received, under the contract and the renewals and extensions thereof, monthly compensation equal to the monthly compensation which he had been receiving under said radio contract on February 4 and March 20, 1944.

On his income tax return for the calendar year 1944, petitioner claimed deductions in the sum of $9,000.00 by reason of alimony payments made to Ruth Fidler dur-

ing said year. Of this sum, $1,800.00 was paid by petitioner prior to the rendition of the decree of divorce on March 20, 1944, and at the trial of this proceeding, petitioner conceded that such sums aggregating $1,800.00 paid prior to the decree of divorce would not be properly deductible by him.

In his income tax returns for the calendar years 1945 and 1946 petitioner claimed deductions in each year in the sum of $9,600.00 by reason of the alimony payments made to Ruth Fidler during those years.

Respondent, in his notice of deficiency, disallowed the deductions claimed in each year upon the ground that "said amounts do not qualify as proper deductions under the provisions of section 23(u) of the Internal Revenue Code."

In the year 1937, petitioner acquired by assignment and transfer from William N. Selig a stock of literary properties consisting of all of Selig's literary rights, motion picture rights and other property rights, of every kind and nature, in approximately seventy-five published novels and stage plays, and approximately 2,000 original manuscripts, scenarios, and motion picture shooting scripts. Petitioner paid Selig $5,000.00 for these properties.

A Mr. Bentel, who was a literary agent and friend of petitioner, induced petitioner to buy the literary properties. Bentel advised petitioner that Selig was in failing health and was willing to sell these properties at what Bentel considered to be a reasonable price because among them were some properties which Bentel believed were quite good and which might be sold to motion picture studios at a profit.

Petitioner had an oral understanding with Bentel that Bentel would conduct a campaign to sell the stories, books, or plays, and that after petitioner recouped his $5,000.00 investment from such sales, he and Bentel would thereafter divide the returns on a "fifty-fifty" basis.

After the literary properties were acquired, a tabulation was made of them, and they were placed on display in the offices of Bentel.

Petitioner purchased the literary properties with the intention of attempting to sell some of them at a profit. They were not purchased for use in his work as a commentator or columnist, and none of them was ever used in such work. No sale of any of the literary properties was consummated prior to 1945, although at one time petitioner and Bentel thought a studio was going to purchase a book entitled "Under Two Flags." In 1945, petitioner sold all of the literary properties acquired from Selig for $250.00, to Eric Ergenbright, who was, and had been, an employee of petitioner for many years.

In his income tax return for the year 1945, petitioner claimed a deduction in the amount of $4,750.00 as an ordinary loss. In determining the deficiency the respondent disallowed the claimed deduction stating that the "ordinary loss claimed of $4,750.00 from sale of Selig Library of books and manuscripts has been determined to be a loss from the sale of capital assets held for more than six months and subject to the provisions of section 117(b) and (d) of the Internal Revenue Code."

The Tax Court of the United States sustained the respondent in his determinations [R. 140-151], and this petition seeks a review of the Tax Court's decision.

Specification of Errors.

1. The Tax Court erred in deciding that payments in the amounts of $9,000.00, $9,600.00 and $9,600.00 made by petitioner to his divorced wife during the years 1944, 1945 and 1946 constituted "installment payments" as distinguished from "periodic payments" within the meaning of Section 22(k) of the Internal Revenue Code and were not deductible by petitioner under the provisions of Section 23(u) of the Internal Revenue Code.

2. The Tax Court erred in deciding that the loss sustained by petitioner in the calendar year 1945 in the amount of $4,750.00 from the sale of books and manuscripts constituted a loss from the sale of capital assets held for more than six months and subject to the provisions of Section 117(b) and (d) of the Internal Revenue Code and in failing to decide that the loss was an ordinary business loss deductible in full under the provisions of Section 23(e).

Preliminary Summary of Argument.

I. The Alimony Question.

The payments made by the petitioner to Ruth Fidler of the sums of $800.00 each month during the period from April 1, 1944 to December 31, 1946, for her support and maintenance constituted "periodic payments" within the provisions of Section 22(k) of the Internal Revenue Code, and were therefore deductible by petitioner under the provisions of Section 23(u). The payments were not "installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument"

incident to the divorce decree because the amended divorce decree did not specify petitioner's obligation in a fixed and definite "principal sum." The amended divorce decree [R. 107], in effect, imposed upon petitioner the obligation to make monthly payments to his former wife for her support and maintenance, to and including August, 1948, in amounts of not more than $800.00 and not less than $500.00 per month, with the exact amount to be paid to depend on the amount of petitioner's income from his radio employment during said period.

The financial obligation which petitioner finally agreed to assume with respect to the support and maintenance of his wife was spelled out in their final Settlement Agreement dated February 4, 1944 [R. 65-84]. The promissory notes delivered on said date as part of said agreement were merely additional documentary evidence of said obligation. When said Settlement Agreement was adopted and incorporated by the Court as a part of its decree, the petitioner's obligation under said agreement and said promissory notes was merged into the Court's decree, and the decree fixed the nature and measure of petitioner's obligation. The decree did not impose two separate obligations upon petitioner in the amounts of $500.00 and $300.00 per month respectively, but rather imposed a single obligation to pay alimony in the maximum amount of $800.00 per month but subject to reduction to not less than $500.00 per month in the event of cessation or diminution of petitioner's radio employment income. The total amount which he would be required to thus pay was

not fixed and definite, but was variable, depending upon his future income. The payments, therefore, were not installment payments upon a specified "principal sum."

The object of Congress in enacting Sections 22(k) and 23(u) of the Internal Revenue Code was to eliminate the injustice and hardship which resulted under the pre-existing law whereby a husband when divorced from his wife and ordered by a court to support her was not allowed to deduct the amounts paid from his income tax. These statutory provisions should be reasonably construed to carry out the intent and purpose of Congress.

II. The Loss From the Sale of Literary Properties.

The loss which petitioner sustained in 1945 upon the sale of stock of literary properties was an ordinary business loss, deductible in full under the provisions of Section 23(e). The literary properties did not constitute "capital assets," but to the contrary, fell within those types of property expressly excluded from "capital assets" by Section 117(a)(1), *i.e.,* "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

ARGUMENT.

I.

The Payments Made by Petitioner to Ruth Fidler of the Sums of $800.00 Each Month During the Period From April 1, 1944 to December 31, 1946, for Her Support and Maintenance Constituted Periodic Payments Within the Provisions of Section 22(k) of the Internal Revenue Code, and Were Therefore Deductible by Petitioner Under the Terms of Section 23(u).

The issue to be decided depends upon the proper interpretation of provisions added to the Internal Revenue Code by Section 120 of the Revenue Act of 1942, 56 Stat. 798, c. 619, which presently appear as Sections 22(k) and 23(u) of the Internal Revenue Code. The pertinent portions of those provisions read as follows:

> "SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> "In computing net income there shall be allowed as deductions:
>
> * * * * * * * *
>
> "(u) Alimony, Etc., Payments.—In the case of a husband described in section 22(k), amounts includible under Section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. * * *
>
> "SEC. 22. GROSS INCOME.
>
> * * * * * * * *
>
> "(k) Alimony, Etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments * * * received subsequent to such decree in discharge of, * * *

a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, * * * Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife * * * does not exceed 10 per centum of such principal sum. * * *"

The object of Section 22(k) was to do away with the apparent injustice under which a man divorced from his wife and ordered by a court to support her, was not allowed to deduct the amounts paid from his income tax.

Herbert v. Riddell (D. C. S. D. Cal.), 103 Fed. Supp. 369.

The legislative history demonstrates this purpose..

See:

Senate Report No. 163, Committee on Finance, 77th Cong., 2nd Sess., C. B. 1942-2, p. 568;

House Report No. 2233, Committee on Ways and Means, 77th Cong., 2nd Sess., C. B. 1942-2, p. 409 at p. 427.

See also:

Cox v. Commissioner (1949), 176 F. 2d 226, at 228.

In the House Report of Congress above referred to, it is stated (C. B. 1942-2, p. 409):

> "The existing law does not tax alimony payments to the wife who receives them, nor does it allow the husband to take any deduction on account of alimony payments made by him. He is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations.
>
> "The bill would correct this situation by taxing alimony and separate maintenance payments to the wife receiving them, and by relieving the husband from tax upon that portion of such payments which constitutes income to him under the present law. This treatment is provided only in cases of divorce or legal separation and applies only where the alimony or separate maintenance obligation is discharged in periodic payments. Moreover, the portion of such payments going to the support of minor children of the husband does not constitute income to the wife nor a deduction to the husband. The same is true with regard to payments in discharge of lump sum obligations, even though made in installments."

The statute covers two types of situations in the allocation of income for tax purposes between divorced parties. If there is a lump sum payment promised *in the nature of a property settlement,* this is not taxed to the wife whether

the money is paid in one payment or spread over a period of years. On the other hand, if the husband agrees or is ordered to pay the wife for her support regular payments either in indefinite amounts or for an indefinite period of time, the payments are "periodic," taxable to the wife, and constitute a deduction for the husband.

Cf.:

Estate of Frank Charles Smith, Deceased (C. C. A. 3rd, Nov. 13, 1953), 208 F. 2d 349.

In the case at bar, the payments involved made by the petitioner were not in settlement of property rights, but were for the support and maintenance of his former wife. They do not constitute "installment payments" because the divorce decree did not specify a fixed and "principal sum" which petitioner was obligated to pay to Ruth Fidler for her support and maintenance. They, therefore, constitute "periodic payments."

The term "periodic payments" is not expressly defined by Section 22(k).

"Periodic payments" are defined by Nelson, in *Divorce and Separation* (2nd Ed., pp. 30-31), as follows:

> "An allowance of permanent alimony, where payable in money, is either (1), a lump sum payable on or near the rendition of the decree of divorce, (2) a lump sum payable in installments, or (3) *an allowance of periodical payments* without limitation as to time or *for a fixed period without designation of the total amount to be paid.*" (Emphasis added.)

The foregoing definition by Nelson was approved and adopted by the Tax Court in its early decision of *Roland Keith Young,* 10 T. C. 724. In that case, a divorce de-

cree was rendered between the taxpayer and his wife, which incorporated and adopted the provisions of a written agreement entered into between them. Under the divorce decree, taxpayer was required, in accordance with the terms of the written agreement, to make total monthly payments to his former wife for her support for a limited priod of fifty months, *i. e.*, for November and December of 1940, and for the twelve months of the four succeeding years, 1941, 1942, 1943 and 1944, and thereafter no further payments would be required. The amounts to be paid during each year depended upon the amount of the net income of the taxpayer for the preceding year. If the net income of taxpayer in a preceding year amounted to $50,000.00, he was required to pay for support and maintenance $12,000.00, in monthly payments of $1,000.00. If, in any one or more of the four calendar years, beginning with the year 1940, his net income should fall below $50,000.00, the payments to be made by him in the next succeeding year were to be that portion of $12,000.00 which would be represented "by the fraction thereof of which the net income for the preceding year is the numerator and the sum of $50,000.00 is the denominator."

The taxpayer-husband made payments to his former wife in accordance with this formula and deducted such payments on his income tax returns on the theory that they constituted "periodic payments." The Commissioner contended that they constituted "installment payments." In ruling in favor of the taxpayer-husband, the Tax Court found as follows:

> "Neither the decree of divorce nor the terms of the agreement of February 20, 1940, which were incorporated in and adopted under the decree *obligated petitioner to pay to his former wife any total, fixed sum*

over the fifty-month period. Rather the payments were left indefinite in amount excepting as to the maximum amount for a year, dependent upon the annual earnings of the petitioner; and his future annual earnings could not be determined as of the date of the final decree, October 22, 1941. The divorce decree provided only a method for computing the amounts to be paid by petitioner in each one of the future years, and the maximum to be paid in any year and for any month if petitioner's net income should be $50,000.00.

"The payments which petitioner made pursuant to the divorce decree were alimony payments, and they were periodic payments."

In its opinion the Tax Court held, in part, as follows:

"Petitioner contends that the divorce decree, by its terms, did not obligate petitioner to pay his former wife a definite sum of money over the prescribed period of fifty months. He points out that it would not have been possible at the time the decree was entered to compute a lump sum or total sum from the provisions in the decree relating to the future payments because the future payments were dependent upon his future net income, and neither the future gross nor the future net income was fixed.

* * * * * * * *

"It is our conclusion that the payments were periodic payments as that term is used in Section 22(k). We find from all of the evidence that petitioner's contentions are correct. The divorce decree allowed to the former wife periodic (monthly) payments for a fixed period *without designation of the total amount to be paid.* Such payments are considered to be 'periodical payments' as distinguished from

'a lump sum payable in installments.' See Nelson, Divorce and Annulment (2d Ed.), sec. 14.23, vol. 2, pp. 30, 31.

"* * * They (petitioner and his former wife) agreed that the maximum total of the monthly pay ments would be $1,000.00. This plan of monthly payments was adopted by the court and set forth in the divorce decree. * * * The provisions in the divorce decree did no more than prescribe a maximum total monthly payment, based upon an annual net income of $50,000.00, and a method for computing monthly payments on the basis of any annual net income below $50,000.00. *These provisions did not fix any total sum as a fixed sum to be paid over the fixed period of fifty months.* Therefore, the payments in question were not payments 'discharging part of an obligation the principal sum of which is, in terms of money or property, specified in the decree.' It follows that the payments were not 'installment payments,' but were 'periodic payments' under section 22(k).

"Petitioner is entitled to deductions under Section 23(u) for the periodic payments which he made in 1942 and 1943." (Emphasis added.)

John H. Lee, 10 T. C. 834, also involved an agreement between the taxpayer-husband and his former wife wherein, just as in the case at bar, the amount which the husband would be required to pay his wife would be measured by and dependent upon the amount of his income. The taxpayer, Mr. Lee, had agreed to pay his wife, for a period of five years, 33⅓ per cent of the first $12,000.00 and 25 per cent of the excess, if any, of his annual net income over $12,000.00. He was to pay $46.15 each week and to make up the difference as soon as practicable after the end of each year. The husband deducted the

payments thus made during the years 1942 and 1943. The commissioner, just as in the case at bar, contended that the payments were not "periodic payments" but were "installments payments" within the meaning of Section 22(k), and therefore not deductible by petitioner.

The Tax Court, in overruling the Commissioner, made in part the following observations which are so clearly pertinent to the case at bar:

> "* * * The total payments to be made in the present case could not be as satisfactorily calculated in advance because there was no means of determining what the 'net income' of this petitioner might be.
>
> * * * * * * * *
>
> *"The Agreement of the parties in this case fixed no principal sum* and it was impossible to know in advance how much the petitioner would have to pay his wife. * * * *These payments do not come within the description of installment payments contained in Section 22(k). All other payments are to be considered as periodic payments and taxable to the wife rather than to the husband.* The period of five years fixed by the agreement is not sufficient, in view of the uncertainty as to the amount, to make these payments taxable to the husband under sections 22(k) and 23(u). Cf. Roland Keith Young, 10 T. C. 724." (Emphasis added.)

The foregoing interpretations by the Tax Court of the terms "periodic payments" and "principal sum" are reasonable and logical; there can be no doubt that the term "principal sum," as used in Section 22(k), contemplates a *fixed* and *definite* amount—"a total sum as a fixed sum" —"the total amount to be paid."

As Judge Yankwich stated in *Herbert v. Riddell, supra,*

> "Ordinarily, it might be difficult to draw a distinction between periodic payments and installment payments. For periodic payments may imply merely payments over a period of time. So may installment payments. But the Congress and the Treasury Department make it clear that 'periodic' payments are payments made at different times, which, as to *amount* or duration, are *indefinite.* Installments, on the other hand, are payments made periodically of amounts, equal or unequal, *as portions of a definite and established whole.* And this is what is meant by the phrase contained both in the section and regulation that the 'principal sum * * * is, in terms of money or property, specified in the decree of divorce or legal separation, or in an instrument incident thereto.' " (Emphasis added.)

This is but another form of expression of the concept voiced in the *Young* and *Lee* cases.

The Committee on Ways and Means of Congress, in making its report on this legislation, uses the term *"lump sum"* as synonymous with "principal sum" when, in referring to the class of payments which would not be considered as income to the wife, it makes the statement:

> "The same is true with regard to payments in discharge of lump sum obligations, even though made in installments." (See, House Report No. 2233, Committee on Ways and Means, 77th Congress, 2nd Session, C. B. 1942-2, p. 409.)

The Commissioner, in his regulation, at one point uses the expression "gross sum" as apparently synonymous with "principal sum." (Reg. 103, Sec. 19-22(k)-1 (as added by TD 5194, CB 1942-2, p. 56), subparagraph (c), Example (1).)

All of these expressions but corroborate the conclusion that a "principal sum," as used in Section 22(k), means a *fixed* and *definite* amount.

In view of the foregoing, can it be reasonably held that the divorce decree [R. 107-109] in this case specified "the principal sum," required by Section 22(k), in order to make the monthly payments non-deductible as "installment payments?" If so, what was the principal sum? Is it the amount arrived at by multiplying 53 months by the sum of $500."? That would have been but the *minimum* aggregate amount of the payments required. Can it be ascertained by multiplying 53 months by the sum of $800.00? That would have been but the *maximum* aggregate amount which Mr. Fidler might have been required to pay.

It is evident that the decree did not specify a principal sum, as required by Section 22(k). There was not a definite and fixed sum "specified" to be paid which could have ascertained by any form of mathematical calculation at the time that the divorce decree was rendered. And the answer must be determined as of the time that the divorce decree was rendered—and not in retrospect. When the Commissioner argued in the *Lee* case that a lump sum was specified in that case "because at the end of five years the exact amount would be known," the Tax Court responded: "That argument also carries too far, because eventually all uncertainties in every case will be resolved by the passing of time." (10 T. C. 836.) This statement is equally applicable to the case at bar.

The Tax Court, in concluding that a "principal sum" was specified in this case, seeks to disregard the legal effect of the decree of divorce and the payments ordered thereby. It seeks to ignore the substance of the obliga-

tion imposed upon petitioner by the decree. Instead, it relies upon the technical form of the promissory notes which petitioner had executed before the decree of divorce was rendered in order to conclude therefrom that petitioner's obligation under the divorce decree "consisted of two *separate components* of $500 and $300, each." [R. 142.] It then goes on to reason, in effect, that the $500.00 monthly payments which were still due and owing under the unexpired period covered by the first two notes could be calculated into a "principal sum" and that therefore these $500.00 monthly payments were "installment payments." It followed the same reasoning with respect to the third note which had been executed prior to the divorce decree with respect to the $300.00 monthly payments. In connection with the latter note, it held in effect that the contingent nature of this note, *i. e.,* the fact that petitioner's liability in respect of the $300.00 payment might be reduced or eliminated if petitioner should fail to obtain future radio contracts with at least the same level of compensation, did not detract from the fact that it specified a "principal sum" which petitioner was obligated to pay, under the reasoning employed in its previous decisions in *J. B. Steinel,* 10 T. C. 409; *Estate of Frank P. Orsatti,* 12 T. C. 188, and *Harold M. Fleming,* 14 T. C. 1308.

The conclusions, aforesaid, reached by the Tax Court are untenable for the reasons hereafter discussed.

The promissory notes involved were executed merely as additional evidence of the obligation which petitioner finally agreed to assume with respect to the support and maintenance of his wife as set forth in their final Settlement Agreement dated February 4, 1944 [R. 65-84]. Ruth Fidler, in her complaint for divorce against the peti-

tioner, requested that the Settlement Agreement be approved by the Court [R. 61]. The divorce decree expressly provided that the agreement was "confirmed, ratified, approved and *adopted*" as a part of the decree [R. 108].

The effect of the Court's action was to adopt and incorporate the Settlement Agreement into the decree. The decree, therefore, superseded the agreement and notes and became the basis of petitioner's liability to his former wife with respect to monthly payments to her for her support and maintenance.

42 C. J. S., p. 188, Footnote 50;

Spreckels v. Wakefield (C. C. A. 9th), 286 Fed. 465;

Hough v. Hough, 26 Cal. 2d 605, 160 P. 2d 15 (wherein the California court reviews and lists the decisions from numerous other jurisdictions on this point);

Herbert v. Riddell (U. S. D. C., Cal.), *supra,* 103 Fed. Supp. 369;

Lewis v. Lewis, 53 Nev. 398, 2 P. 2d 131, at 136.

In *Hough v. Hough, supra,* the Court states:

"A decree which incorporates an agreement is a decree of court nevertheless, and as soon as incorporated into the decree *the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. Once the contract is merged into the decree, the value attaching to the separation agreement is only historical.*" (Emphasis by the Court.)

As Judge Yankwich stated in *Herbert v. Riddell, Collector of Internal Revenue, supra:*

> "The obligation to pay derives not from the agreement of the parties, but from the order of the court, as the section just referred to (I. R. C., section 22(k)) clearly indicates. And courts have declined to recognize for this purpose voluntary agreements not made obligatory by court decree. *Smith v. Commissioner,* 1948, 2 Cir., 168 F. (2d) 446 (36 AFTR 1007); *Daine v. Commissioner,* 1948, 2 Cir., 168 F. (2) 449 (36 AFTR 1080); *Cox v. Commissioner,* 1949, 3 Cir., 176 F. (2) 226 (38 AFTR 301); *Commissioner v. Walsh,* 1949, U. S. App. D. C., 183 F. (2) 803 (39 AFTR 801)."

And, further:

> "And it is quite evident that, regardless of contract, the Congress intended that deductibility or non-deductibility shall be dependent on the legal obligation which ultimately compels the payment,—*i.e.,* the Court decree. See, *Commissioner v. Murray,* 1949, 2 Cir., 174 F. (2) 816 (37 AFTR 1520), 817."

After the rendition of the amended decree of divorce in this case, Ruth Fidler would not have had any right of action on those portions of the Settlement Agreement which had been incorporated in and made an operative part of the divorce decree, nor upon the promissory notes. Her remedy, in the event that petitioner had defaulted in the monthly payments ordered to be made for her support, would have been under the divorce decree, including such aids as execution, contempt, and other enforcement process of the Court, together with an action on the decree. (*Hough v. Hough, supra,* 160 P. 2d 15, at p. 19.)

The amended decree of divorce [R. 108] unequivocally demonstrates that the decree incorporated and specifically ordered the petitioner to pay to his wife monthly sums for her support in an amount not greater than $800.00 per month nor less than $500.00 per month. This order specifically covered the monthly payments which petitioner had agreed to make to his wife for her support and maintenance under the terms of the Settlement Agreement and the promissory notes executed and delivered as a part thereof, and superseded the contractual obligation imposed upon petitioner by said Settlement Agreement and promissory notes in this respect, by the following language [R. 108]:

> "It Is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement Agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should defendant, at any time before August 1, 1948, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract, and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to

> plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder."

Insofar therefore as the monthly payments for support and maintenance are concerned, the above language from the decree imposed but a single obligation upon the petitioner. It in no manner separates such obligation into "two separate components." The decree does not specify that the $800.00 payments ordered shall consist of "two separate parts." The payment ordered by the Court is but a single payment. Whatever separate payments as such, might have been required under the terms of the promissory notes executed prior to the rendition of the decree of divorce were by the Court's decree, in effect, unified and consolidated into a single monthly payment. This is not only the substance and reality of the situation, but is, under the cases above cited, the actual legal effect of the decree.

The Tax Court, in its opinion, ignores the fact that the decree superseded the contractual obligations assumed by petitioner in the Property Settlement Agreement and promissory notes. It impliedly holds, notwithstanding the foregoing cases, that the agreement and promissory notes are still controlling. It states, by way of a passing remark set forth in a footnote as follows [R. 144]:

> "To the extent that there may be any conflict between provisions of the agreement and other parts of the decree, it is abundantly clear that it was the intention that the agreement was to be controlling. In one respect in which there was such a discrepancy, the decree was thereafter amended to conform to the agreement, as shown in our findings."

Certainly, it was the intention of the parties that the agreement which they executed on February 4, 1944, should be the basis for any decree or judgment thereafter rendered between them [see Paragraph Twenty-First of Agreement at R. 82]. But certainly the parties, or at least their attorneys, recognized that, as a matter of law, the decree would be controlling if it incorporated and adopted the Property Settlement Agreement as a part thereof. That is precisely why the attorneys for Mr. Fidler went to such great trouble to cause the decree to be amended to conform to the agreement of the parties when the first decree which was entered failed to accurately set forth the nature and extent of Mr. Fidler's obligation. See, in this regard, the extensive correspondence which took place between the attorneys for the parties following the rendition of the erroneous decree, and which led up to the correction thereof by the Court [Supplemental Stipulation of Facts, and Exs. 5-12, R. 111-122]. Obviously, the attorneys recognized that, irrespective of the intention of the parties, the Court's decree would be controlling over the agreement, and that therefore it was mandatory that the decree be amended to properly set forth the obligations which Mr. Fidler had assumed under the agreement. However, irrespective of what their intention might have been, the fact remains that, as a legal proposition, the decree of divorce, as amended, became controlling upon the parties.

Even in the absence of the controlling effect of the decree, and even if it be assumed *arguendo* that the agreement had not been incorporated and merged into the decree, so that it would be merely a question of construing the nature of the obligation imposed by the agreement alone, it is submitted that the efforts of the Tax Court to

separate the monthly payments for the support and maintenance of Mrs. Fidler into two separate obligations of $500.00 and $300.00 each is a hypertechnical reliance upon form and an unreasonable disregard of the clear meaning of the Property Settlement Agreement. (See, in this regard, the comments of Circuit Judge Hastie in *Estate of Frank Charles Smith, supra,* hereinafter referred to in greater detail.)

When the substance and realities of the situation which existed between Mr. and Mrs. Fidler are analyzed, it is clear that there is no proper justification for attempting to convert the monthly support payments into two separate and distinct obligations.

Under the first agreement of August 20, 1943, Mrs. Fidler had agreed to accept for her support and maintenance a sum of $500.00 per month for a minimum period of three years, with similar monthly payments of $500.00 for two more years provided that she did not remarry within such last two-year period. This obligation was set forth in the agreement in the form of two promissory notes, one in the sum of $18,000.00 dated August 20, 1943, providing for $500.00 monthly payments to be made immediately, and without provision for cessation in event of Mrs. Fidler's remarriage. These payments would have continued to and including the month of August, 1946. The contingent obligation for the following two years was set forth in the agreement as a separate promissory note in the sum of $12,000.00, with $500.00 monthly payments thereunder to commence on September 1, 1946. This note contained the provision that it would become ineffective upon remarriage of Mrs. Fidler [see agreement of August 20, 1943, at R. 86-96].

As part of said agreement it was further agreed that the exclusive custody of the child of the parties was to be with petitioner, and Mrs. Fidler was to receive a lump sum of $20,000.00 in cash or securities as her part of the property of the parties, together with a Packard automobile.

Apparently Mrs. Fidler was dissatisfied with the fact that she would not receive any support payments during the last two years of the contemplated five-year period in the event that she remarried. So, this condition was eliminated by the amendment of October 21, 1943 [Ex. "B," R. 96-99], with the result that petitioner's obligation, as of such date with respect to the support and maintenance of Mrs. Fidler was to make payments at the rate of $500.00 per month for a total of five years, irrespective of whether Mrs. Fidler remarried or not.

Then, on December 16, 1943, the agreement was again amended to accord Mrs. Fidler custody of the minor child for equal periods of time with petitioner, with the further obligation upon petitioner to pay all of the child's living expenses, including a nurse's care, while in the custody of Mrs. Fidler [Ex. "C," R. 99-101].

Thereafter, however, Mrs. Fidler retained another attorney and, finally the agreement of February 4, 1944, was negotiated and executed.

As of this date, petitioner's principal business was that of a radio commentator. Although he was then under contract to render his services on a weekly radio broadcast program, the term of said contract was only 26 weeks. And, while the sponsor of said program had the right to renew and extend said contract for additional periods of time, petitioner had no assurance that this

would be done [Stipulation of Facts, Par. XII, at R. 63-64, and Findings of Fact at R. 132]. Petitioner had experienced periods when he was not at all employed on radio, as for example, in 1940, 1941 and 1942, when his contract with one company had expired and he had not obtained another [R. 45].

It was undoubtedly on account of the uncertainty of petitioner's future income from his radio employment that the parties arrived at the plan finally agreed upon in the Settlement Agreement of February 4, 1944 [R. 65]. By this agreement, among other things, petitioner agreed to and did transfer and convey to Mrs. Fidler an additional $7,000.00 in cash or securities as her share of and in division of the properties of the parties, and agreed to pay $200.00 per month for the care and maintenance of the minor child during those periods when said child was in Mrs. Fidler's custody.

In addition to the foregoing, petitioner, in effect and substance, agreed to pay to Ruth Fidler for her support and maintenance of minimum of $500.00 and a maximum of $800.00 per month to and including the month of August, 1948, the exact amount to be paid to depend on the amount of his income from his radio employment during said period. This was accomplished by petitioner undertaking to continue to make consecutive payments as provided for under the two promissory notes, dated August 20, 1943, and October 21, 1943, theretofore executed and delivered to Mrs. Fidler, at the rate of $500.00 per month as called for by said notes, and in addition thereto, petitioner agreed to make additional concurrent payments of not to exceed $300.00 per month, but subject to reduction or waiver, in acccordance with the terms and con-

ditions of a third promissory note executed and delivered by petitioner to Mrs. Fidler on February 4, 1944.

Said third note contemplated and provided that petitioner would pay a maximum of $300.00 per month for 54 consecutive months. It further provided, however, that if petitioner during said period should not have a radio contract under the terms of which he received a monthly sum equal to that which he was receiving on February 4, 1944, under his then existing radio contract, then the monthly payments falling due under this note during said period would be reduced in proportion to the amount of the reduction of his then existing radio contract. And, if petitioner should have no radio contract at all, such monthly payments of $300.00 would be waived entirely, and petitioner would not be required at any future time to pay the balance of any reduced, or waived payments.

It thus appears that while Mrs. Fidler was to receive a minimum of $500.00 per month, she was entitled to receive not to exceed an additional $300.00 per month, if petitioner's earnings under his then existing or any subsequent radio contract equalled the earnings which he was receiving from his radio contract as of the date when said note was executed.

The notes, therefore, were intimately related in such way that they together, and with the agreement of which they were a part, provided continuing regular monthly payments of money for current maintenance and support of Mrs. Fidler in an amount not more than $800.00 and not less than $500.00 per month, until August 1, 1948.

That this was clearly the intention of the parties is demonstrated by the language of Paragraphs Seventh and

Eighth of the agreement of February 4th, reading as follows [R. 74-76]:

* * * * * * * *

"That Second Party accepts said three (3) promissory notes, for her support and maintenance and not in lieu of property rights, upon the following conditions:

"(a) In lieu of other provision for the support and maintenance of Second Party during her natural life;

"(b) In full payment, discharge and satisfaction of all obligations or any thereof, on the part of First Party to maintain or support Second Party during her natural life;

"(c) In full payment, discharge and satisfaction of counsel fees and costs in any pending or future action between the parties hereto, other than an action on said or any of said promissory notes.

"Eighth: That the installment payments provided in the three (3) promissory notes hereinabove set forth, being taxable to her as income, Second Party will, from and after the date hereof, file such income tax returns and/or declarations, both Federal and State, as are required by law, and will include therein all such support and maintenance payments received by her, and will pay all taxes shown to be due and payable under such returns and/or declarations.

"Should any of the monthly installments provided for in the said $16,200.00 promissory note, last above described, be reduced or waived and the payor not be required to make same, First Party will give to Second Party, not for her support and maintenance, but as an absolute gift without condition, sufficient moneys to enable Second Party to pay her income

taxes, both Federal and State, when due, on support and maintenance payments received from First Party, but not on income received by Second Party in excess thereof, without resort to the support and maintenance payments provided for in the two other promissory notes, above described, it being the intention of the parties hereto that Second Party will, during any period that the payments under said promissory note last above described are reduced or waived, have a net minimum sum of $500.00 per month for her support and maintenance."

The Tax Court seeks to ignore the substance of the transaction by refusing to read the three notes together; it, instead, views the first two notes as an isolated undertaking to pay a sum certain within five years. If we may paraphrase the language of Judge Hastie, in *Estate of Frank Charles Smith, supra,* "this refusal to read and interpret" the notes in relation to each other "results in an unreasonable disregard of the clear meaning of the agreement."

The statements made by the United States Court of Appeals for the District of Columbia in *Alfons B. Landa v. Commissioner* (decided Jan. 14, 1954), ... F. 2d. ..... (P-H, Federal Tax Service 1954, Par. 72,317), in an alimony case are appropriate to the case at bar. In that case, the taxpayer-husband had executed a promissory note to his wife agreeing to pay her a total of $30,000.00 in $200.00 monthly installments. The note stated that these sums were in repayment of an indebtedness which he owed her. The evidence, however, showed that there was no indebtedness and that the payments were made for the wife's support. The Tax Court, because of the form and language of the note, refused to permit the husband

to claim the payments as deductions. After two appeals to the Court of Appeals from adverse decisions by the Tax Court, the taxpayer finally prevailed. On the second and final appeal, decided on January 14, 1954, as aforesaid, the Court of Appeals, in reaching its conclusion in favor of the taxpayer, stated:

> "'* * * in the field of taxation, administrators of the laws, and the courts, are concerned with substance and realities, and formal written documents are not rigidly binding.' The purpose of this rule is manifest. Whenever taxation is allowed to depend upon form, rather than substance, the door is opened wide to distortion of the tax laws, which after all, represent the legislative judgment for an equitable distribution of the tax burden generally. *Clearly this purpose is not advanced by applying the rule only if it serves to increase the tax in a particular case. 'The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of the rule.'*" (Emphasis ours.)

The Tax Court has held herein that the contingency provided for in the agreement and decree, whereby the total payments which petitioner was ordered to pay to his wife for her support was expressly made subject to reduction in the event of cessation or diminution in his radio employment income, did not preclude the existence or ascertainment as of the date of the decree of an obligation on the part of petitioner specified in a "principal sum" In reaching this conclusion, the court relies upon its reasoning and conclusions in *J. B. Steinel,* 10 T. C. 409; *Estate of Orsatti,* 12 T. C. 188, and similar cases.

J. B. Steinel involved a decree of divorce which ordered the taxpayer husband to pay his former wife $100.00

monthly until $9,500.00 was paid, unless she remarried, in which event the remaining payments not in default would be cancelled. *Estate of Orsatti* also involved a similar situation—an agreement to pay $125.00 per week for a period of two years or until such time as the divorced wife should remarry or die, whichever first occurred. In these cases, the Tax Court concluded that the contingency involved only affected the "obligation," but did not affect the "principal sum" specified, and that therefore, the payments made were "installment payments" on a "principal sum" obligation. It is exceedingly difficult to understand this reasoning. If the contingency, even if it supposedly affects merely the "obligation," makes it impossible to know in advance how much the taxpayer will be required to pay his wife—if the total amount to be ultimately paid is uncertain or variable at the time that the decree is entered or the agreement is made—it would logically seem that there is no fixed and definite amount prescribed, and that therefore the payments are periodic payments and not installment payments of a specified lump sum or "principal sum" as required and contemplated by the statute.

In answer to this phase of the Tax Court's opinion, it is respectfully submitted that this Court should reject the Tax Court's interpretation just as the Courts of Appeals for the Second and Third Circuits have rejected it (We are advised that the same question is now pending before this Court for determination in *Benjamin Davidson v. Commissioner,* No. 13767.) Furthermore, and in the alternative, it is submitted that there are essential differences between the contingencies involved in the *Steinel* and *Orsatti* cases and that involved in the case at bar.

In *Baker v. Commissioner* (C. C. A. 2d, decided June 15, 1953), 205 F. 2d 269, the Court's opinion, on this point, reads as follows:

> "The separation agreement made between the taxpayer Mr. Baker and his former wife, and incorporated in the divorce decree, provided that he was to pay her $300 per month from September 1, 1946 to August 31, 1947, and $200 a month from September 1, 1947 to August 31, 1952, but that, should she die or remarry, his obligation to make any such payments thereafter would cease. The Tax Court held that these were 'installment payments'—within section 22(k) of the Internal Revenue Code—each discharging 'a part of an obligation the principal sum of which is * * * specified in the decree.' We do not agree.
>
> "Section 22(k) differentiates 'periodic payments' and 'installment payments.' The latter, as the wording shows, must be parts of a 'principal sum.' Here no such sum was explicitly stated in figures. But the Tax Court said: 'Simple arithmetic indicates that the principal sum to be paid was $15,600'—in other words, the addition of the several payments. *Were there no contingencies, this conclusion might be sound.* But there are contingencies which the Tax Court ignored. In doing so, it cited *J. B. Steinel,* 10 T. C. 409, where it had said (p. 410) that 'the word "obligation" is used in Section 22(k) in its general sense and includes obligations subject to contingencies where those contingencies have not arisen and have not avoided the obligation during the taxable years.' See to the same effect, *Estate of Frank P. Orsatti,* 12 T. C. 188, and *Harold M. Fleming v. Commissioner,* 14 T. C. 1308. We see no justification for this interpretation." (Emphasis ours.)

The Circuit Court, after pointing out the impossibility of predicting when the wife might remarry, went on to hold:

> "* * * the language of the statute before us in the instant case—'the principal sum * * * specified in the decree'—*clearly implies an amount of a fairly definite character,* and thus carries with it no such suggestion of uncertainty. Consequently, in this respect, we reverse the decision of the Tax Court." (Emphasis ours.)

The Court stated that the fact that the wife involved had actually remarried in September, 1949, was wholly irrelevant.

The Court of Appeals for the Third Circuit has likewise rejected the theory announced by the Tax Court in the *Steinel, Orsatti,* and other similar cases. In *Estate of Frank Charles Smith, Deceased,* decided on November 13, 1953, 208 F. 2d 349), a husband, under the terms of a property settlement agreement with his wife, executed as an incident to impending divorce litigation, had agreed with her, among other things, in the first paragraph of said agreement, to pay her $25,000.00 in ten equal and semi-annual installments commencing on the 15th day of February, 1947; in the second paragraph of said agreement he agreed to pay her, in addition, the sum of $300.00 every month beginning on the first day of December, 1946, for a period of 5 years; and in the third paragraph of the agreement, he agreed, in addition, to pay to her the sum of $100.00 per month on the first day of December, 1951, and on the first day of each calendar month thereafter, during the term of the remainder of her natural life.

There was a clause in the agreement that in the event of the death of the husband during the lifetime of the wife or in the event of the death of the wife or upon her remarriage, all payments provided for should cease, except certain other payments due under certain life insurance policies.

A divorce decree was granted to the taxpayer's wife but, unlike the case at bar, the decree did not incorporate the provisions of the agreement.

The husband-taxpayer made certain of the $2,500.00 semi-annual payments provided by the first paragraph of the agreement, and certain of the $300.00 monthly payments provided for by the second paragraph of the agreement. The Tax Court held that both classes of payments were "installment payments" and therefore not deductible by the husband. On appeal, the Third Circuit Court sustained the Tax Court with respect to the $2,500.00 installment payments on the $25,000.00 obligation, but reversed the Tax Court's decision on the non-deductibility of the $300.00 monthly payments and held that the theory adopted by the Tax Court in *Steinel* and similar cases was erroneous. In so holding, the Third Circuit Court stated:

> "The case turns upon the provisions of 22(k) and 23(u) of the Internal Revenue Code. The statute quite evidently covers two types of situations in the allocation of income for tax purposes between divorced parties. If there is a *lump sum payment promised in the nature of a property settlement* this is not taxed to the wife whether the money is paid in one payment or spread over a period of years. The latter is an 'installment' payment. On the other hand, if the husband agrees or is ordered to pay the

wife a sum of money as support regularly for an indefinite time that is a 'periodic' payment. The income therefrom is taxable to the wife and payments constitute a deduction for the husband. (Emphasis ours.)

* * * * * * * *

"Reference to the separation agreement will show that in addition to the $25,000 the husband further agreed to pay the wife $300 monthly for five years and $100 monthly thereafter for her life or until her remarriage. Nine of these $300 payments were made subsequent to the divorce decree in 1947. Taxpayer claims a deduction of $2700 therefor.

"The Commissioner taxes the position that since the sum total to be paid by the husband was mathematically calculable, payments made in liquidation of the agreement are 'installment' payments not taxed to the wife and for which the husband gets no deduction. This was the view of the Tax Court and is supported by a line of decisions in that court. Whether individual cases can be distinguished does not matter; the Tax Court judge in this case was perfectly right in relying on the theory supported by previous Tax Court decisions. *Steinel v. Commissioner,* 10 T. C. 409 (1948); *Orsatti v. Commissioner,* 12 T. C. 188 (1949); *Casey v. Commissioner,* 12 T. C. 224 (1949).

"Opposed to this line of Tax Court decisions is the Second Circuit's decision in *Baker v. Commissioner,* 205 F. 2d 369 (C. A. 2, 1953). All the Commissioner can do about this case is to say it is wrongly decided. We do not think it is wrongly decided. In the first place by the terms of this agreement, made between the Smiths prior to their divorce, there were three contingencies, the occurrence of any one of which would have relieved the taxpayer or his estate

from the obligatoin to make these monthly payments. First, if the husband died he was no longer liable. Second, if the wife died the husband was no longer liable. Third, if the wife remarried the husband was no longer liable. *The promise to pay was not therefore one which could be mathematically calculated as a certain obligation of the husband.*

"Furthermore. we do not read into the statute a requirement that the terms of payment must run over ten years in order that this become a periodic contract within the terms of the Act. It seems to us that this set of facts calls for a fairly clear application of the distinction indicated in Section 22(k), which provides for both the lump-sum payment on which it would be quite unfair to tax the wife, and the month-to-month kind of payment for support, in which the Congress was seeking relief for alimony-paying husbands. Each type was included in this contract. We think that the husband was entitled to a deduction by the terms of the statute for the $300 monthly he paid his former wife in 1947 by the terms of their agreement. In other words, he is entitled to the deduction of $2,700 which was denied him."

The Tax Court, in deciding the *Smith* case, had in effect pursued the same type of reasoning which it attempts to employ in the case at bar. It considered the $300.00 monthly payments provided for by the second paragraph of the agreement as a separate and distinct obligation from the $100.00 monthly payments provided for by the third paragraph. Circuit Judge Hastie, concurring in the decision by the Third Circuit Court of Appeals, pointed out:

"* * * I am sure that the Tax Court reached an incorrect result in the present case for a reason which has nothing to do with the new doctrine of the *Baker* case.

"Any rational reading of the first three paragraphs of the agreement in this case must reveal that, *while the first paragraph is the lump sum property settlement type of provision,* the second and third paragraphs are intimately related in such way that they together provide continuing regular monthly payments of money for current maintenance and support, albeit in decreased amount after five years, to the wife for life. It is not disputed that payments of this latter type are 'periodic payments' within the meaning of Section 22(k).

"The Tax Court avoids this conclusion by refusing to read the second and third paragraphs together, but rather viewing the second paragraph as an isolated undertaking to pay a sum certain within five years. *I think this refusal to read and interpret consecutive provisions in relation to each other results in an unreasonable disregard of the clear meaning of the document.* It would require that the two paragraphs be read together, thus necessitating a construction contrary to that of the Tax Court, but without reaching the problem of the *Baker* case." (Emphasis ours.)

Likewise, in the case at bar—the $27,000.00 in cash and securities which Mr. Fidler paid to his wife was the lump sum property settlement type of provision, and was not deductible by him, and would not have been deductible even if paid in three or four annual installments. But, the payments involved—the $800.00 monthly payments, considered together—were the periodic payments for support and maintenance which Congress contemplated and intended would be deductible by the husband and taxable to the recipient wife.

Furthermore, there are essential differences between the contingencies involved in the *Steinel* and *Orsatti* cases, and the case at bar.

The contingencies and conditions in the *Steinel* and *Orsatti* cases were conditions which qualified and pertained only to the underlying legal duty and obligation, arising out of the marital relationship, of the husband to support his wife. They were conditions which contemplated and would have resulted in a *complete avoidance and cancellation* of the husband's duty and *obligation* to support, in the event the condition occurred. They did not involve provisions which had for their purpose a *continuance of the obligation* to support, with but a *mere reduction* in the amounts to be paid.

On the other hand, in the case at bar, there was no condition involved, as in the *Steinel* and *Orsatti* cases, which provided for a *complete cancellation and termination of the husband's obligation* to make payments prior to the expiration of the specified period of time. There was no condition annexed to the obligation; Mr. Fidler's *obligation* to make payments was an *absolute* one which would continue throughout the specified period. The conditional provisions of the decree pertained to the *amounts* to be paid, as distinguished from the obligation to make any payments whatsoever in the event that a certain condition occurred.

The reasoning in the *Steinel* case that only the "obligation" is conditional and not the "principal sum" specified is illogical and unreasonable. However, it can in any event be applied only to a condition or contingency which *completely cancels* and *avoids* the obligation of the husband to continue to support his wife and make any pay-

ments at all. It is only because the condition would result in a complete cancellation of the duty and obligation to support and would cut off *all* future payments that it is possible to contend that the condition affects only the obligation, and not the ascertainability of the "principal sum" which Section 22(k) requires to be specified.

If the condition is one which does not completely cut off and cancel the obligation to pay, but merely reduces the sums thereafter payable, then it is not the "obligation" which is conditional, but rather it is the amount payable which is conditional. And, if the amount to be paid is a conditional and variable one, subject to merely reduction or change (as distinguished from complete cancellation) because of such things as fluctuations in the husband's future income, it is impossible to properly state that a "principal sum" has been specified in the decree.

The reasoning of the *Steinel* and *Orsatti* cases, therefore, cannot with propriety be extended to cover a situation wherein the occurrence of the condition would merely reduce the amounts thereafter payable by the husband to the wife. Such a result would be incompatible with the basic premise of the *Steinel* case that a "principal sum" is specified and that only the obligation to pay is conditional and subject to avoidance upon the occurrence of the condition.

There are other material differences between the contingencies involved in the *Orsatti* and *Steinel* cases and the case at bar. In those cases, the conditions involved were events which were entirely beyond the control and responsibility of the husband. They were events which in no manner were dependent upon the future variations or fluctuations in his income. In each case, at the time

that the decree was rendered, the husband knew in advance that insofar as he was concerned, he was obligated to his wife in a fixed and definite sum, and that the obligation was one beyond his power to vary or terminate. Whether the *obligation* was to be *cancelled* or terminated prematurely was dependent upon subsequent events entirely beyond his power and authority either to cause or to prevent.

In the case at bar, the contingency was to some degree, within the control of the husband. The formula was one dependent upon the husband's compensation—it was "geared" to his income. It was impossible for either the husband or wife to know at the time that the decree was entered how long he would continue to be employed as a radio commentator or what his earnings therefrom would be. It was therefore impossible to, and the divorce decree did not, specify "the principal sum" to be paid, but this was left variable and contingent upon Mr. Fidler's future income from his radio employment.

As further support for the contention that the rule of the *Steinel* case should be rejected, and in any event, should not be extended to a condition or contingency which merely reduces the amounts payable as distinguished from cancelling the obligation in its entirety, consider the effect of such an extention upon the applicability and interpretation of that provision of Section 22(k) reading as follows:

> "* * * except that an installment payment shall be considered a periodic payment for the purposes of this sub-section if such principal sum, by the terms

> of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, *but only to the extent that such installment payment for the taxable year of the wife * * * does not exceed 10 per centum of such principal sum.*" (Emphasis ours.)

Assume, for purposes of argument, that instead of being directed to make payments for only 53 months, Mr. Fidler had been ordered to do so for 10 years and 9 months, to January 1, 1955. Assume further, for the purposes of emphasizing the problem involved, that instead of the decree providing for a minimum payment of $500.00 per month, the minimum was fixed at $100.00, which provision for payment of an additional $700.00 instead of $300.00, so that the $800.00 maximum remained the same. (The substitution of the minimum sum of $100.00 for that of $500.00 would not in any way affect the problem whether or not a "principal sum" is specified or ascertainable in the decree.)

Let us further assume that during the period from March, 1944, to January 1, 1955, covered by the decree, Mr. Fidler's employment in radio had varied as follows: during 1944, 1945, and 1946, he continued to be employed under a contract under which he drew as much as he did at the time of the decree; that during the years 1947, 1948, 1949, and 1950, because of lack of a sponsor, he was not employed at all in radio; that during the years 1951 and 1952, he was employed for six months of each year at the same compensation; and that during the years 1953

and 1954 he was employed continuously at the same compensation which he had received when the divorce decree was rendered. Over the period involved, Mrs. Fidler would have received, under our hypothetical situation, the following:

Year Involved	Mr. Fidler's Employment Status	Amounts Received by Mrs. Fidler
Apr. to Dec., 1944	Employed throughout	$ 7,200
1945	" "	9,600
1946	" "	9,600
1947	Not employed	1,200
1948	" "	1,200
1949	" "	1,200
1950	" "	1,200
1951	Employed 6 months	5,400
1952	" " "	5,400
1953	Employed throughout	9,600
1954	" "	9,600
	Total paid over entire period	$61,200

Because the payments, under this hypothetical situation, now extend over a period of 10 years, they are includible in the income of the wife and deductible by the husband, *but* "only to the extent that such installment payment for the taxable year of the wife *does not exceed 10 per centum of such principal sum.*"

Mrs. Fidler, when she commenced to receive these payments, did not know how much she was going to receive, in the aggregate, over the hypothetical period of 10 years and 9 months. She could have received a maximum of $800.00 per month for 10 years and 9 months, a total of $103,200.00, or a minimum of $100.00 per month aggregating $12,900.00.

However, if the conclusion of the opinion filed in this case is correct that a "principal sum" was ascertainable, Mrs. Fidler was required to include in each calendar year payments received by her during such year to the extent that same did not exceed "10 per centum of such principal sum." And, Mr. Fidler, on the other hand, was entitled to deduct payments only to the extent of said 10%.

How, then, would Mr. and Mrs. Fidler have calculated their respective deductions and inclusions at the end of each calendar year, as they were required to do?

Would the Commissioner have asserted that they should have prepared their income tax returns upon the assumption that the maximum amount of $103,200.00 would be paid, and that said sum was the "principal sum" payable? If so, would the Commissioner have made the same assertion at the end of the year 1947 when the sums receivable by Mrs. Fidler amounted to only $1,200.00? Or at the end of the year 1950, when by reason of Mr. Fidler's lack of radio income for the years 1947, 1948, 1949 and 1950, the maximum amount payable by him under the terms of the decree would have already been reduced $33,600.00 to the sum of $69,600.00, even if it were assumed at said time that he would thereafter be employed at full compensation during the years 1951 through 1954?

And, finally, what would have been the position of the Commissioner at the end of the 10 year 9 month period, when for the first time, the exact amount of Mr. Fidler's maximum obligation was ascertainable, and it was then learned that he had paid his wife a total of but $61,200.00, of which 10% amounted to but $6,120?

Would the Commissioner have the right to assert that the deductions taken by Mr. Fidler in the year 1944 in the sum of $7,200.00 and in the years 1945, 1946, 1953 and 1954 in the sums of $9,600.00 in each year were excessive because they exceeded the annual ten per cent limitation of $6,120.00, and that Mrs. Fidler on the other hand had reported too much income in said years to the same extent? Would it have been necessary for the parties to amend their returns accordingly?

It is impossible to furnish the answer to these problems. They but illustrate the impropriety of attempting to hold that a "principal sum" has been specified in the decree or agreement in this case. The fact that these problems did not arise in the case at bar does not detract from the fact that they *could* have arisen, and that it is proper to keep them in mind in determining whether or not a "principal sum," within the intendment of Section 22(k) is ascertainable or specified in the decree.

In conclusion, it is respectfully submitted that since neither the agreement nor the decree of divorce directed the petitioner to pay a fixed "principal sum," it is apparent that the payments which were made cannot be considered as "installment payments" within the provisions of Section 22(k), but constituted periodic payments as contended by petitioner, and were therefore properly deductible by him.

In many cases of this kind wherein controversies arise between divorced husbands and the Bureau of Internal Revenue as to whether the wife should be compelled to pay income taxes on the support and maintenance payments received by her from her former husband, there are often circumstances or factors which indicate that the

wife, at the time of entering into a settlement agreement with her husband, was either inadequately represented or misinformed as to the tax consequences of the agreement, and was persuaded to enter into the agreement upon the understanding that she would not be required to pay income taxes upon the alimony payments which she would receive from her husband. Under such circumstances, the Commissioner, through his agents, may understandably seek to construe the agreement if possible so as to cause the tax consequence thereof to concur with the wife's understanding and to relieve her of the tax obligation. These circumstances are wholly absent in the case at bar. In the preparation of the final setlement agreement of February 4, 1944, Mrs. Fidler was represented by eminent counsel, and in Paragraph Eighth of the agreement, it is clearly and unequivocally provided that the support payments received by Mrs. Fidler would be taxable to her as income, and that she would include all such support and maintenance payments received by her in her income tax returns and would pay all taxes shown to be due thereunder. Both parties clearly understood that the payments would constitute taxable income to Mrs. Fidler.

It clearly appears, therefore, that petitioner's right to claim such deductions is not only sustained by the provisions of Sections 22(k) and 23(u), and the intention and purpose of Congress in enacting same, but that such right would be fully in accord with the intention and agreement of the parties that such payments would be taxable income to Mrs. Fidler.

While the agreement between the parties would not necessarily be binding upon this Court as to the tax consequences thereof, it is a circumstance which should be considered.

II.

The Loss Which Petitioner Sustained in 1945 Upon the Sale of the Stock of Literary Properties Was an Ordinary Business Loss, Deductible in Full Under the Provisions of Section 23(e). The Literary Properties Did Not Constitute "Capital Assets," but to the Contrary, Fell Within Those Types of Property Expressly Excluded From "Capital Assets" by Section 117(a)(1), i. e., "Stock in Trade of the Taxpayer or Other Property of a Kind Which Would Properly Be Included in the Inventory of the Taxpayer if on Hand at the Close of the Taxable Year, or Property Held by the Taxpayer Primarily for Sale to Customers in the Ordinary Course of His Trade or Business."

The facts with respect to the purchase by petitioner of this stock of literary properties for the sum of $5,000.00, his subsequent efforts and failure to sell certain stories therefrom, and his sale of said entire stock at a net loss of $4,750.00 have been hereinbefore set forth.

The provisions of the Internal Revenue Code involved are:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

* * * * * * * *

"(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

"(1) If incurred in trade or business; or.

"(2) If incurred in any transaction entered into for profit, though not connected with the trade or business; * * *"

* * * * * * * *

"SEC. 117. CAPITAL GAINS & LOSSES.

"(a) *Definitions:*—As used in this chapter—

"(1) *Capital Assets.*—the term 'capital assets' means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *."

It appears clear from petitioner's testimony that, in reliance upon the opinion and belief of his long-time friend, Mr. Bentel, an experienced literary property broker, that many of the stories and properties included in the stock could be resold at a profit, petitioner purchased the stock from Mr. Selig with the intention and hope of reselling some of the stories and rights at a profit to the motion picture studios [R. 36-37].

There can be no doubt that petitioner's testimony which is not disputed that he purchased these literary properties for one and only one purpose, and that was to attempt to make money by reselling some of the rights at a profit.

Petitioner did not purchase the properties with the intent or purpose of using them in his work as a radio commentator or columnist, nor did he ever use any of them for such purpose [R. 38-50].

While petitioner planned to primarily rely upon Mr. Bentel to find buyers for the properties, and for this reason the books and manuscripts were kept on display in Mr. Bentel's office and place of business for purposes

of exhibition to prospective customers, petitioner himself attempted to make sales therefrom [R. 18].

The books and manuscripts which represented and evidenced in physical form the literary property rights which petitioner had purchased from Mr. Selig, and which were tabulated, filed and kept on display in Mr. Bentel's office and place of business for purposes of exhibition to prospective customers [R. 39] can reasonably be considered as "stock in trade."

The properties were held by petitioner exclusively for sale to customers who could utilize such kinds of properties, and they were held by petitioner "in the ordinary cause of his trade or business" in that when Mr. Fidler purchased such literary properties with the intention of offering them for resale at a profit, he in effect embarked upon another "trade or business" in addition to his principal vocation and business of being a radio commentator and newspaper columnist.

It is clear, and it has been repeatedly held, that a person may engage in both a profession and business. While it is true that at the time that petitioner purchased the literary properties it was his intention to permit Mr. Bentel to find customers for same and handle the sales thereof, such fact in itself does not mean that petitioner was not engaged in the trade or business of selling such properties. Carrying on a business through agents is a very common practice.

See on this precise point:

Commissioner of Internal Revenue v. Boeing (C. C. A. 9th), 106 F. 2d 305;

Fackler v. Commissioner, 133 F. 2d 509;

Harry F. Payer, Tax Court Memorandum Opinion, Docket No. 7701 (P-H 1946, T. C. Memo., Par. 46239).

Numerous other decisions recognizing the foregoing principles that a taxpayer may engage in an incidental business in addition to his principal business, and that the business is that of the taxpayer even though handled through an agent, are listed in Prentice-Hall, Federal Tax Service, 1954, Paragraphs 5575, 5576.

The fact, therefore, that petitioner in the case at bar considered his work as a radio commentator to be his chief means of livelihood did not preclude him from engaging in another distinct business, to-wit. the purchase and sale of literary properties.

It is not necessary that there be great personal activity or the expenditure of large funds upon an office, place of business, etc., in order to determine that one has acquired property and holds same primarily for sale to customers in the ordinary course of trade.

See:

Reis v. Commissioner (C. C. A. 6th), 142 F. 2d 900.

The foregoing cases indicate that the principal question to be determined is whether or not the taxpayer actually

acquired the property in the first instance for the purpose of offering same for sale to customers, or in the alternative, after having acquired the property, thereafter held same primarily for the purpose of sale to customers, as distinguished from holding same for purposes of investment.

The fact that in the case at bar petitioner had been wholly unsuccessful in selling any of the literary properties from the time that he acquired same in 1937 until he disposed of them in 1945 does not affect the conclusion that he had acquired and was holding such properties for resale and was, in a limited sense, carrying on a business, notwithstanding that the business was without profit during the years in question.

See *N. Stuart Campbell,* 5 T. C. 272, wherein the court made this pertinent observation:

> "Obviously the inability to rent or sell the property at a profit during the taxable years does not take from the venture its business character * * *."

See, also,

Leland Hazard, 7 T. C. 372.

It has often been held by the Courts, particularly in the more frequent cases which arise involving real estate, that a taxpayer may be considered as regularly engaged in business even though no sales have been made for several years. Business adversity or failure of anticipated sales does not change the primary purpose for which the property was acquired and held, and does not convert it into an investment.

See:

P-H Federal Tax Service, 1954, *supra,* Par. 5587.

In the light of the foregoing decisions, and the facts of this case, it should be concluded that when petitioner purchased the stock of literary properties involved with the intention and purpose of reselling stories therefrom for the purpose of realizing a profit, and immediately thereafter held and offered them for such purpose, he embarked, to a limited degree, upon a separate and distinct business from his other activities. The properties which he purchased literally as well as actually constituted a "sock in trade" and he held same for one and only one purpose, namely, to sell same to customers. The mere fact that the business of selling such intangibles as literary property rights is not a commonplace or ordinary one, and does not involve the same problems and requirements as are confronted by merchants of such merchandise as clothing, groceries, etc., does not mean that it should not be recognized for tax purposes as the business which it is.

It is an undeniable fact that petitioner lost the sum of $4,750.00 as a result of this unsuccessful business venture. He should be permitted to deduct such loss in full. "The taxpayer as well as the Commissioner of Internal Revenue is entitled to the benefit of the rule" and principles announced in the foregoing cases.

Alfons B. Landa v. Commissioner, supra.

Conclusion.

For the reasons hereinbefore stated, it is respectfully submitted that the decision of the Tax Court should be reversed, and that it should be determined by this Court that there are no deficiencies in petitioner's income tax for the years 1944, 1945 and 1946, with the exception that petitioner's deduction claimed on his income tax return for the year 1944 in the sum of $9,000.00 representing alimony payments should be reduced to the sum of $7,-200.00, which sum represents the payments made by petitioner during the year 1944 subsequent to the divorce decree of March 20, 1944. Petitioner has conceded in these proceedings that he was not entitled to deduct the payments aggregating $1,800.00 made by him prior to the time the divorce decree was rendered.

Respectfully submitted,

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
W. I. GILBERT, JR.,
Counsel for Petitioner.

No. 14,204

In the United States Court of Appeals for the Ninth Circuit

JAMES M. FIDLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
HILBERT P. ZARKY,
DAVIS W. MORTON, JR.,
Special Assistants to the Attorney General.

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 122-150) are reported at 20 T.C. No. 149.

JURISDICTION

This case involves individual income tax deficiencies of $7,316.60 for the calendar year 1944 (R. 17), of $10,293.79 for the calendar year 1945 (R. 19), and of $6,992.74 for the calendar year 1946 (R. 20). Notice of the deficiencies was mailed to taxpayer on January 31, 1950. (R. 14-15.) On April 26, 1950 (R. 3), within the permitted 90-day period, taxpayer filed a petition for review with the Tax Court for a redetermination of the

deficiencies under the provisions of Section 272 of the Internal Revenue Code (R. 6-13). The Commissioner filed an answer (R. 21-22) and a hearing was held on February 5, 1952 (R. 23-59). The decision of the Tax Court sustaining the deficiencies was entered on September 29, 1953. (R. 150-151.) Petition for review by this Court was filed on December 18, 1953. (R. 151-153.) This Court accordingly has jurisdiction of the case under the provisions of Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether, within the meaning of Sections 22(k) and 23(u) of the Internal Revenue Code, the Commissioner properly disallowed, as "installment payments," deductions of $7,200, $9,600, and $9,600, claimed, respectively, as "periodic payments" made to taxpayer's divorced spouse during the calendar years 1944, 1945 and 1946.

2. Whether, within the meaning of Sections 23 and 117 of the Internal Revenue Code, the Commissioner properly treated as a long term capital loss a claimed deduction of $4,750, which taxpayer had treated in his 1945 income tax return as an ordinary loss arising on an alleged sale of certain books and manuscripts.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra.*

STATEMENT

The facts giving rise to the legal issues here presented, including the stipulation (R. 59-64), exhibits (R. 65-110), and supplemental stipulation and exhibits (R. 111-

122) which were incorporated therein by reference (R. 124), are set forth in the Tax Court's findings of fact (R. 124-140) and appear as follows:

Taxpayer is a resident of Los Angeles, California. He filed his income tax returns for the calendar years 1944, 1945 and 1946 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles. (R. 124-125.)

In 1936 taxpayer was married to Ruth Law Fidler, sometimes known as Roberta Law Fidler and Roberta L. Fidler (hereinafter referred to as "Ruth Fidler"). (R. 125.)

There was no issue of this marriage, and in 1942 taxpayer and Ruth Fidler adopted a newly-born baby girl. (R. 125.)

Thereafter, taxpayer and Ruth Fidler became separated, and on August 20, 1943, they entered into a written agreement which provided, among other things, that taxpayer should have the exclusive custody and control of the minor child, subject to Ruth Fidler's right to reasonable visitation; that upon the execution of the agreement, Ruth Fidler should receive, as her share and in full division of the property of the parties, a certain Packard automobile and $20,000 in cash or securities; and that, in addition thereto, taxpayer would pay to Ruth Fidler, in full and final payment for her support, maintenance and alimony, the sum of $30,000 in monthly installments of $500 per month, commencing on September 1, 1943. Taxpayer's obligation to make such payments at the rate of $500 per month to Ruth Fidler for her support and maintenance was evidenced by two promissory notes executed by taxpayer and delivered to

her, concurrently with the execution of the agreement, and the terms of the notes were set forth in full in the agreement. One of the notes provided for the payment to Ruth Fidler of the sum of $18,000, payable in consecutive, monthly installments of $500 per month commencing on September 1, 1943. The second note provided for the payment of the sum of $12,000, payable in consecutive, monthly installments of $500 per month, commencing on October 1, 1946. Each note contained a provision that in the event taxpayer defaulted in the payment of any installment when due, the whole note might become immediately due and payable at the option of Ruth Fidler or the holder thereof, and that should suit be commenced to enforce payment of the note, taxpayer would pay such additional sums as attorney's fees as the court might adjudge to be reasonable. (R. 125-126.) The $12,000 note, only, contained the following additional provision (R. 126):

> This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, for the support and maintenance of the payee. This note shall become absolutely void and of no effect upon any remarriage of the payee and whether or not such remarriage shall be valid.

The agreement of August 20, 1943, was prepared by a firm of Los Angeles attorneys who represented Ruth Fidler. (R. 126.)

On October 21, 1943, an amendment to the agreement of August 20th was executed by taxpayer and Ruth Fidler, the effect of which was to eliminate the provision above quoted appearing in the $12,000 note, and Ruth Fidler acknowledged receipt of the $12,000

note, as thus amended, and also the $18,000 note above referred to. (R. 126-127.)

On December 16, 1943, the agreement was again supplemented and amended to provide, in effect, that Ruth Fidler should have exclusive custody and control of the minor child of the parties for a period of six months during each year and that taxpayer should have the exclusive custody and control of the child for a like period of six months during each year; and that during such times as Ruth Fidler should have the custody and control of the child taxpayer would pay the costs of a nurse, food, clothing and medical expense for the child. (R. 127.)

On February 4, 1944, the taxpayer and Ruth Fidler entered into a new agreement, which superseded their previous agreements. This new agreement also made provision for the custody and support of the minor child of the parties, and settled all rights and claims in respect of property and support between the parties. It, in substance, provided among other things that each of the parties should have the exclusive custody and control of their minor child for six months during each year, and that taxpayer would pay to Ruth Fidler for the care, support and maintenance of the child during the period that she should have its custody and control the sum of $200 per month as well as any extraordinary medical care and attention required for the child; that in addition to the Packard automobile and $20,000 in cash or securities theretofore transferred by the taxpayer to Ruth Fidler as her share of and in full division of the property of the parties, taxpayer agreed to and did transfer to her an additional sum of $7,000 in cash or securities. (R. 127-128.) In addition to the foregoing, and with respect to alimony, support and main-

tenance for Ruth Fidler, the agreement provided as follows (R. 128):

> Seventh: In addition to the foregoing, and on account of full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party does hereby redeliver to Second Party, and Second Party will retain, those two (2) certain promissory notes, being the same notes described in Paragraph First of Amendment to Agreement of August 20, 1943, in words and figures as follows, to-wit: * * *

After setting forth, verbatim, the terms of the two promissory notes hereinabove referred to, as amended on October 21, 1943, the agreement goes on to provide for additional payments in the form of a third promissory note as follows (R. 128-131):

> In addition to the foregoing and in full and final payment of maintenance and support, alimony and alimony pendente lite to Second Party, and counsel fees and costs in any pending or future action between the parties hereto, First Party will, upon the execution of the within instrument, make, execute and deliver unto Second Party one (1) promissory note, in words and figures as follows, to-wit: $16,200.00.
>
> Los Angeles, California
> February 4, 1944.
>
> At the time stated after date, for value received, I promise to pay to Roberta L. Fidler, only at Los Angeles, California, the sum of Sixteen Thousand

Two Hundred ($16,200.00) Dollars, without interest. Principal payable in lawful money of the United States. This note is payable in installments of Three Hundred ($300.00) Dollars each month, payable upon the first day of each and every calendar month subsequent to the first day of March, 1944, and any default in the payment of any installment when due shall cause the whole note to become immediately due and payable at the option of said Roberta L. Fidler. Should suit be commenced to enforce the payment of this note, I agree to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit. Demand, presentment for payment, protest and notice of protest are hereby waived.

This promissory note is given by the undersigned to the payee in accordance with an Agreement executed by and between the parties this date, on account of the support and maintenance of the payee. Should payor, at any time during the term hereof, not have a radio contract under the terms of which he receives a monthly sum equal to the monthly sum he is now receiving under his present radio contract, the monthly installments falling due hereunder during said periods shall be reduced in proportion to the amount of the reduction of his present radio contract, and should payor have no radio contract at all, then all monthly installments falling due hereunder during said period, shall be waived by payee, and payor shall not be required at any future time to pay the balance of any reduced, or waived payments, hereunder.

(S.) James M. Fidler,
4362 Clybourne Avenue,
Burbank, California.

That Second Party accepts said three (3) promissory notes, for her support and maintenance and not in lieu of property rights, upon the following conditions:

(a) In lieu of other provisions for the support and maintenance of Second Party during her natural life;

(b) In full payment, discharge and satisfaction of all obligation or any thereof, on the part of First Party to maintain or support Second Party during her natural life;

(c) In full payment, discharge and satisfaction of counsel fees and costs in any pending or future action between the parties hereto, other than an action on said or any of said promissory notes.

Eighth: That the installment payments provided in the three (3) promissory notes hereinabove set forth, being taxable to her as income, Second Party will, from and after the date hereof, file such income and tax returns and/or declarations, both Federal and State, as are required by law, and will include therein all such support and maintenance payments received by her, and will pay all taxes shown to be due and payable under such returns and/or declarations.

Should any of the monthly installments provided for in the said $16,200.00 promissory note, last above described, be reduced or waived and the payor not be required to make same, First Party will give to Second Party, not for her support and maintenance, but as an absolute gift without condition, sufficient moneys to enable Second Party to pay her income taxes, both Federal and State, when due, on support and maintenance payments re-

ceived from First Party, but not on income received by Second Party in excess thereof, without resort to the support and maintenance payments provided for in the two other promissory notes, above described, it being the intention of the parties hereto that Second Party will, during any period that the payments under said promissory note last above described are reduced or waived, have a net minimum sum of $500 per month for her support and maintenance.

In the preparation and execution of the agreement of February 4, 1944, taxpayer and Ruth Fidler were each represented by attorneys of Los Angeles, California. (R. 132.)

At the time of the execution of the agreement and for several years prior thereto, taxpayer's principal business or occupation was that of radio commentator and newspaper columnist. (R. 132.)

The "present radio contract" referred to in the agreement of February 4, 1944 (and in the amended decree of divorce hereinafter referred to), was a contract which was in force on February 4, 1944, and March 20, 1944, between taxpayer and the sponsor of a weekly radio broadcast program under which taxpayer was engaged to render his services as a commentator and reporter on the weekly radio program. The term of the radio contract was 26 weeks. The sponsor, however, had the option to renew and extend the contract of employment for additional, successive terms of 26 weeks' duration. (R. 132.)

In 1944 Ruth Fidler, as plaintiff, instituted an action in the District Court of the State of Nevada in the County of White Pine against taxpayer, as defendant, wherein she prayed that she be granted a divorce from

taxpayer and that the agreement of settlement and separation of February 4, 1944, be approved by the court. (R. 132.)

Ruth Fidler was represented in the action by a firm of attorneys of Las Vegas, Nevada. (R. 132.)

Taxpayer never personally appeared in the Nevada divorce action, but authorized an attorney of Ely, Nevada, to appear for him. (R. 132.)

The divorce action was tried at Ely, Nevada, on March 20, 1944, and a decree of divorce was rendered in favor of Ruth Fidler against taxpayer. (R. 133.)

The formal decree of divorce as signed by the judge of the court adjudged and ordered as follows (R. 133-134):

> Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the marriage relationship now and heretofore existing between plaintiff and defendant be and the same is hereby dissolved and the parties are restored to the status of single persons.
>
> It Is Further Ordered, Adjudged and Decreed that that certain Settlement Agreement entered into between the parties, dated February 4, 1944, be and the same is hereby confirmed, ratified, approved and adopted as a part of this Decree.
>
> It Is Further Ordered, Adjudged and Decreed that the defendant herein have the care, custody and control of the minor child, named Bobbe Fidler, Jr., until October 1, 1944, and thereafter the plaintiff is to have the custody of the child for the next ensuing six months, or until April 1, 1945, thereafter the custody of said child shall be distributed to the parties for six months each, until further order of this Court; that during the term plaintiff has custody of the said minor child, defendant shall pay to her for the care, support and maintenance

of said child, the sum of Two Hundred ($200.00) Dollars per month.

It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

The Court herewith retains jurisdiction herein with reference to the said minor child for the purpose of making such orders as may hereafter appear to best serve the interest of said minor child.

Dated and Done this 20th day of March, 1944.

HARRY M. WATSON,
District Judge.

The decree was inconsistent and ambiguous, in that while it "confirmed, ratified, approved and adopted as a part" of it the settlement agreement entered into between taxpayer and Ruth Fidler on February 4, 1944, and ordered taxpayer to make payments to Ruth Fidler "in accordance with the terms of said Settlement Agreement," it also provided that such payments should be "the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years." (R. 134.)

When the Los Angeles attorney who had represented taxpayer in the preparation of the settlement agreement of February 4, 1944, received a copy of the above decree, he immediately noted the inconsistency of its provisions, and communicated with Ruth Fidler's attorneys in Las Vegas, Nevada, concerning it, and suggested that the decree be amended to reflect correctly the terms of the settlement agreement. (R. 134.)

The inconsistency in the decree was due to inadvertence, and Ruth Fidler's attorneys agreed that the decree should be amended. A form of amended decree was prepared, and on September 11, 1944, Ruth Fidler's attorneys sent such form of amended decree to the attorney at Ely, Nevada, who had appeared for taxpayer in the divorce action, and requested him to present the proposed amended decree to the court. (R. 134-135.)

Thereafter, on September 18, 1944, upon application of the attorney, the court ordered that the decree of divorce be amended to recite correctly the terms and provisions of the agreement of settlement between taxpayer and Ruth Fidler. (R. 135.)

An amended decree, as filed on November 16, 1944, contained the exact terms and language as set forth in the original decree above-quoted except that the following paragraph was deleted (R. 135):

> It Is Further Ordered, Adjudged and Decreed that the defendant shall pay to the plaintiff, in accordance with the terms of said Settlement Agreement, the sum of Eight Hundred ($800.00) Dollars per month, commencing forthwith and continuing for a period of five years.

In lieu thereof the following paragraphs were substituted (R. 135-137):

> It is Further Ordered, Adjudged and Decreed, that defendant shall pay to plaintiff in accordance with the terms of said Settlement agreement the sum of Eight Hundred ($800.00) Dollars per month commencing forthwith and continuing for a period of four years and five months, the last monthly payment becoming due and payable on August 1, 1948, providing, however, that should

defendant, at any time before August 1, 1948, not have a radio contract under the terms of which he received a monthly sum equal to the monthly sum he is now receiving under his present radio contract, monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars of said sum of Eight Hundred ($800.00) Dollars per month, shall be reduced in proportion to the amount of the reduction of his present radio contract and should defendant have no radio contract at all, between the date hereof and said August 1, 1948, then monthly payments to the extent of the sum of Three Hundred ($300.00) Dollars per month of said sum of Eight Hundred ($800.00) Dollars per month, shall be waived and shall not be made to plaintiff by defendant, and defendant shall not be required at any future time to pay to plaintiff the balance of any reduced, or waived, payments hereunder.

It Is Further Ordered, Adjudged and Decreed, that all executory provisions of said Settlement Agreement which are not incorporated in this Decree in a plenary manner, are hereby declared to be binding on the respective parties hereto, and each of said parties is hereby ordered to do and perform all acts and obligations required to be done or performed by said executory provisions of said Settlement Agreement.

The amended decree was dated and signed by the same judge who had tried the divorce action and signed the original decree, in the following fashion (R. 137):

Dated and Done this 20th day of March, 1944.

/s/ Harry M. Watson,
District Judge.

On and prior to March 20, 1944, taxpayer had paid and transferred to Ruth Fidler all moneys and properties due to her under the terms of the settlement agreement of February 4, 1944, had paid certain sums required to be paid to her attorneys for representing her, and had made all payments to her which had then become due and payable to her pursuant to the terms of the promissory notes referred to and described in the agreement. After March 20, 1944, and during the years 1944, 1945 and 1946, taxpayer also paid Ruth Fidler all sums which he was obligated to pay to her under the terms of the settlement agreement and the decree of divorce for the care, support and maintenance of the minor child of the parties. In addition to the foregoing, taxpayer, pursuant to the terms of the agreement and decree, paid to Ruth Fidler as alimony and for her support and maintenance the sum of $800 each month during the period commencing April 1, 1944, and ending December 31, 1946. (R. 137-138.)

The divorce decree as amended remained in full force and effect during the years 1945 and 1946. (R. 138.)

During the period from February 4, 1944, to December 31, 1946, the sponsor of the weekly radio broadcast program hereinbefore referred to, to whom taxpayer was under contract on February 4, and March 20, 1944, exercised its option to renew and extend the contract with the result that taxpayer was continuously employed by this sponsor during this period and received, under the contract and the renewals and extensions thereof, monthly compensation equal to the monthly compensation which he had been receiving under the radio contract on February 4 and March 20, 1944. (R. 138.)

On his income tax return for the calendar year 1944, taxpayer claimed deductions in the sum of $9,000 by reason of alimony payments made to Ruth Fidler during that year. Of this sum, $1,800 was paid by taxpayer prior to the rendition of the decree of divorce on March 20, 1944, and at the trial of this proceeding, taxpayer conceded that such sums aggregating $1,800 paid prior to the decree of divorce would not be properly deductible by him. (R. 138.)

In his income tax returns for the calendar years 1945 and 1946 taxpayer claimed deductions in each year in the sum of $9,600 by reason of the alimony payments made to Ruth Fidler during those years. (R. 138.)

The Commissioner, in his notice of deficiency, disallowed the deductions claimed in each year upon the ground that "said amounts do not qualify as proper deductions under the provisions of section 23(u) of the Internal Revenue Code." (R. 139.)

In the year 1937, taxpayer acquired by assignment and transfer from William N. Selig a stock of literary properties consisting of all of Selig's property rights, of every kind and nature, in approximately seventy-five published novels and stage plays, and approximately 2,000 original manuscripts, scenarios, and motion picture shooting scripts. Taxpayer paid Selig $5,000 for these properties. (R. 139.)

A Mr. Bentel, who was a literary agent and friend of taxpayer, induced taxpayer to buy the literary properties. Bentel advised taxpayer that Selig was in failing health and was willing to sell these properties at what Bentel considered to be a reasonable price because among them were some properties which Bentel believed were quite good and which might be sold to motion picture studios at a profit. (R. 139.)

Taxpayer had an oral understanding with Bentel that Bentel would conduct a campaign to sell the stories, books, or plays, and that after taxpayer recouped his $5,000 investment from such sales, he and Bentel would thereafter divide the returns on a "fifty-fifty" basis. (R. 139.)

After the literary properties were acquired, a tabulation was made of them, and they were placed on display in the offices of Bentel. (R. 140.)

Taxpayer purchased the literary properties with the intention of attempting to sell some of them at a profit. They were not purchased for use in his work as a commentator or columnist, and none of them was ever used in such work. No sale of any of the literary properties was consummated prior to 1945, although at one time taxpayer and Bentel thought a studio was going to purchase a book entitled "Under Two Flags." In 1945, taxpayer sold all of the literary properties acquired from Selig for $250, to Eric Ergenbright, who was, and had been, an employee of taxpayer for many years. (R. 140.)

In his income tax return for the year 1945, taxpayer claimed a deduction in the amount of $4,750 as an ordinary loss. In determining the deficiency the Commissioner disallowed the claimed deduction stating that the "ordinary loss claimed of $4,750.00 from sale of Selig Library of books and manuscripts has been determined to be a loss from the sale of capital assets held for more than six months and subject to the provisions of section 117 (b) and (d) of the Internal Revenue Code." (R. 140.)

SUMMARY OF ARGUMENT

1. Where, pursuant to a decree of divorce or a written instrument incident to a decree of divorce, a hus-

band is obligated to pay a principal sum of money to the divorced spouse and such sum is payable in installments over a period of less than 10 years, the payments received by the wife are not taxable income to her and such payments are not deductible by the husband.

In the present case, the taxpayer-husband was obligated to make payments of $500 per month over a 53-month period. The discharge of this obligation was not subject to any conditions. Accordingly, the Tax Court was correct in holding that these payments were not deductible by the taxpayer.

The taxpayer was also obligated to make additional payments of $300 per month to his divorced wife, but this obligation was conditioned on the taxpayer's having an employment contract of the same kind which he had when the divorce was entered. If this contract were not renewed, the obligation to pay $300 per month would cease, and if the contract paid him less money, this obligation would be proportionately reduced. While we believe the Tax Court was correct in holding that this additional payment was also not deductible even though it was subject to contingencies which never occurred, we recognize that this Court's decision in *Myers* v. *Commissioner* would, if adhered to, require a contrary result in this case if this Court should also conclude that the contingencies here are not substantially different than those present in the *Myers* case.

Whatever may be the decision with respect to the payments of $300 per month which were subject to a contingency, there is no merit in the taxpayer's contention that this contingency should permit the taxpayer to deduct the full $800 per month which he paid his wife. The payment of $500 per month was unconditional and

represented a minimum, principal sum which the taxpayer was obligated to pay in installments. Such payments are nondeductible under the statute.

2. The Tax Court correctly held that, upon the evidence here presented by taxpayer, the loss of $4,750 sustained on taxpayer's sale to an employee in 1945 of certain books and manuscripts purchased in 1937 constituted a long-term capital loss arising on the sale of "capital assets", within the meaning of Sections 23(e), (g) and 117 of the Internal Revenue Code. In this connection, it is apparent from the record that taxpayer's only business or occupation in which he was engaged was that of a radio commentator and newspaper columnist. Neither was he engaged in any other trade or business, as was clearly shown by his testimony reflecting his lack of activity with respect to these literary materials coupled with the absence of any sales of the more than 2,000 items over a period of eight years. Nor was any proof submitted that these properties were excludable from the category of "capital assets" as constituting a stock in trade or property of a kind that would properly be included in inventory, or property held primarily for sale to customers in the ordinary course of trade or business, within the meaning of Sections 22(c) and 117(a)(1) of the Internal Revenue Code. Instead, the record substantiates the Tax Court's holding that the taxpayer purchased these literary properties as an investment in the expectation of selling them at a profit, held them for more than six months, and, upon ultimate sale at a loss, the loss sustained was properly a long-term capital loss within the provisions of Section 117(a)(1), (b) and (d) of the Internal Revenue Code.

ARGUMENT

I

The Tax Court Correctly Held That, Under the Facts Here Obtaining, the Alimony Payments Made by Taxpayer During the Period April 1, 1944, to December 31, 1946, Constituted Non-deductible "Installment Payments" and Not Deductible "Periodic Payments", Within the Meaning of Sections 22(k) and 23(u) of the Internal Revenue Code

1. Section 23(u) of the Internal Revenue Code (Appendix, *infra*) permits a husband, "described in section 22(k)", to deduct, in computing net income, alimony "includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year."

With respect to the inclusion of alimony in the gross income of the recipient wife, Section 22(k) of the Internal Revenue Code (Appendix, *infra*), insofar as here pertinent, provides that she include only "periodic payments" received under circumstances, as follows:

> SEC. 22. GROSS INCOME.
>
> * * * * *
>
> (k) *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, *periodic payments* * * * received subsequent to such decree in discharge of, * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, * * *. [Italics supplied.]

In other words, unless alimony payments to a divorced wife are properly deemed taxable to her as "periodic payments", the payor husband cannot be permitted the deduction provided under the terms of Section 23(u). In describing the legal characteristics of non-deductible payments made by a husband to his divorced wife for her support and maintenance or for alimony, Section 22(k) of the Code provides:

> *Installment payments* discharging a part of an *obligation* the principal sum of which is, in terms of money or property, specified in the decree or instrument shall *not* be considered periodic payments for the purposes of this subsection; * * *. [Italics supplied.]

In other words, when the obligation to the divorced wife is to pay a sum of money, the husband is not entitled to any deduction even though the obligation is not to be paid at one time and is to be discharged by "installment payments" within a period of less than 10 years. It makes no difference whether the agreement or the decree recites the ultimate sum of money which is to be paid in installments, or whether the obligation merely refers to the installments to be paid (which can, of course, readily be added up to ascertain the principal sum which constitutes the husband's obligation). In both situations a "principal sum" is being paid by the husband and in neither situation is the husband entitled to a deduction under the express statutory provisions. *Herbert* v. *Riddell,* 103 F. Supp. 369 (S.D. Cal.). Any other rule would lead to the absurd result under which the tax consequences as between the parties would turn on whether the agreement or decree has added up

or failed to add up to the ultimate sum which is to be paid to the wife in installments. We submit, on the contrary, that in drawing the distinction between "installment payments" and "periodic payments" in Section 22 (k), Congress never intended that the same essential payments should fall in one category or the other dependent only upon whether there has been an arithmetic computation in the decree or the agreement adding up the definite and unconditional payments which the husband is required to make to his divorced wife.

In the present case, under the amended divorce decree, which expressly "adopted" the settlement agreement of February 4, 1944 (R. 108), the taxpayer was obligated to make $800 monthly payments consisting of two separate components of $500 (R. 71-73) and $300 (R. 73-74). The $500 monthly payments were to be made for a definite period of time, i.e., until August 1, 1948, they were not to cease in the event of the husband's death, the wife's death, or the wife's remarriage, and were not subject to any other contingency. Consequently, although the agreement of the parties and the divorce decree did not state the ultimate amount payable, the taxpayer had a simple, unconditional obligation to pay his wife a total of $26,500 through monthly payments of $500 extending over a 53-month period. This, we maintain, is the clearest kind of "principal sum" dischargeable by "installment payments" which Section 22 (k) provides should not be deducted by the husband. The denial of the deduction to the husband is just as clearly required by the statute in the circumstances of this case as would have been true if the agreement or the decree had multiplied the $500 payments by

53 and had stated that the total to be paid equalled $26,500. See *Herbert* v. *Riddell, supra.*

2. The taxpayer was also obligated to make additional payments of $300 per month to his wife during the 53-month period contingent on the taxpayer's having a radio contract paying him the same amount which he was then earning under an existing contract. If the taxpayer were to have no radio contract during that period, he was not obligated to pay her the $300 per month or, if he had a contract paying less money than he was currently receiving, he was only obligated to pay a proportionate part of the $300 per month. (R. 135-137.) Notwithstanding that this part of the taxpayer's obligation was subject to the above described contingencies, the Tax Court held that the obligation to pay $300 per month was also an installment obligation not deductible by the taxpayer. In *Baker* v. *Commissioner,* 205 F. 2d 369 (C.A. 2d), the Court of Appeals reversed the Tax Court and held that where the payments were to cease if the wife remarried, there was a contingency sufficiently incalculable to prevent the overall obligation from being described as a "principal sum". In the present case, the Tax Court respectfully declined to follow the *Baker* decision and decided to adhere to its own contrary precedents. (R. 145-146.)

Subsequent to the decision below, the Court of Appeals for the Third Circuit in *Smith's Estate* v. *Commissioner,* 208 F. 2d 349, also held that there was no "principal sum" where the husband's obligations were to cease if he were to die, if the wife were to die, or if she were to remarry. This Court, in its recent decision in *Myers* v. *Commissioner,* decided May 10, 1954, re-

versed the Tax Court and held that the payments were deductible by the husband where, as the taxpayer contended, the husband's obligation would cease upon the wife's remarriage or on the death of either party. We believe, for the reasons set forth in the Government's brief in the *Myers* case, that the Tax Court's position in that case, in this case, and in other similar cases constitutes a proper application of the statutory standard. However, if this Court should adhere to its decision in the *Myers* case, and if it should determine that there are no cogent distinctions between the contingencies present in the *Myers* case and that present here, we believe that the Tax Court's decision is at variance with *Myers* to the extent that it relates to the payments of $300 per month.

3. The taxpayer claims that, because of the possible contingency affecting the payments of $300 per month, he should be entitled to deduct the full $800 per month payments which were made during the taxable period. The argument seems to be that there was a single obligation to pay $800 per month and that, because of the contingencies affecting the $300 payments, no part of the entire $800 payments can be described as "installment payments" of a "principal sum".

Even if we could assume, *arguendo,* that the taxpayer had a single obligation to pay $800 per month, the unalterable fact remains that part of that obligation, namely, $500 per month, was subject to no contingency and that the taxpayer did have an obligation to pay a minimum "principal sum" of $26,500 in 53 monthly payments of $500 each. That amount, being definite and certain, being subject to no contingencies, and being payable in less than a 10 year period, is not taxable to

the divorced wife and is not deductible by the taxpayer-husband.

We dispute, moreover, the taxpayer's primary assumption that there was but a single obligation to pay $800 per month. As the Tax Court carefully pointed out (R. 142-144) the undisputed facts clearly show that the taxpayer's ultimate obligation of paying $800 per month consisted of two separate components, one to pay $500 per month unconditionally, and the other to pay $300 per month subject to the conditions previously described. The separate aspects of this obligation were consistently recognized by the parties and the divorce court also differentiated the payments to be made.

The amended agreement of the parties (Joint Ex. 1-A, R. 65-85) and the notes executed by the taxpayer pursuant to the agreement (R. 71-74) set forth and specifically recognize that taxpayer had two distinct and different undertakings. One, represented by two notes of $18,000 and $12,000, respectively, was an unqualified obligation to pay $500 per month during the period specified. The other, represented by a note of $16,200, embraced the obligation to pay $300 per month subject to the contingencies already described. It is most significant that when the original divorce decree (R. 105) provided that the taxpayer should pay his divorced wife $800 per month "in accordance with the terms of said Settlement Agreement", the parties considered that there was a possible inconsistency between their agreement and the decree and obtained an amended decree (Exs. 5-12, R. 113-122). The amended decree (Joint Ex. 3-C, R. 107-109) made it exceedingly clear that out of the payments of $800 per month, $500 was absolutely owing and $300 was conditional. We do not know how

the divorce decree could have contained any clearer provisions demonstrating that the taxpayer would be required to pay a principal sum of not less than $26,500 in monthly installments of $500 over the specified, remaining period, i.e., four years and five months.

II

The Tax Court Correctly Held That the Taxpayer Sustained a Long-term Capital Loss on the Sale of Certain Books and Manuscripts

The remaining issue relates to the loss of $4,750 sustained by taxpayer in 1945 upon the sale of books and manuscripts he acquired from one Selig for $5,000 in 1937. (R. 139.)

Taxpayer contends that the Commissioner erred in treating such loss as a long-term capital loss from the sale or exchange of "capital assets"; that the literary properties sold fell within those types of property which are expressly excluded from "capital assets" in Section 117(a)(1) of the Internal Revenue Code (Appendix, *infra*), i.e., "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business"; and that the loss was an ordinary business loss deductible in full under the provisions of Section 23(e) (Appendix, *infra*).

The Commissioner submits that the Tax Court properly held the literary properties here in question constituted capital assets within the meaning of Section 117(a)(1) of the Internal Revenue Code, and that the loss sustained was, accordingly, a long-term capital

loss, subject to the provisions of Section 117(b) and (d) of the Coode. (Appendix, *infra.*)

Section 23(e) provides that individual taxpayers shall be allowed as deductions losses sustained during the taxable year (1) if incurred in trade or business; or (2) if incurred in any transaction entered into for profit, though not connected with trade or business. Section 23 (g) (Appendix, *infra*) provides that losses from sales of capital assets shall be allowed only to the extent provided in Section 117. Losses from the sale of capital assets held for more than six months are deductible only to the extent of $1,000 under Code Section 117 (d).

Here, taxpayer bought the literary properties in question from Selig in 1937, held them for eight years, and sold them in 1945. During the eight year period he never consummated a single sale (R. 39) of any of them, although they comprised more than 2,000 items (R. 139). While he testified that he and Bentel made efforts to sell various books and stories to some of the motion picture studios (R. 38), when asked on cross-examination to name some of the prospects approached regarding their sale, he replied (R. 50-51, 148):

> I don't know that I could specify with stories, to which studios. There were several stories involved, several books involved, and some of them were hot and some were cold. One in particular that was hot, that we thought was sold, was a book called "Under Two Flags." I believe that was the title.
>
> The book called "Under Two Flags," Mr. Bentel and I both believed that the sale—and I think the sale was to have been to RKO, we both believed the sale was in the bag. About that time another studio made a motion picture, which they titled

"Under Two Flags," and it kayoed, or whatever you want to call it—it stopped our sale.

The Commissioner submits that the Tax Court correctly held, on the basis of the record here presented, that taxpayer's only business or occupation was that of a radio commentator and newspaper columnist, that the taxpayer was not in the business of selling literary material, and that the items in question were not his stock in trade and were not being held primarily for sale to customers. (R. 50.)

While it is obvious that an individual may engage in more than one business, taxpayer here has not established that he did so. He made an investment in the literary properties with the hope or expectation of selling them at a profit. This hope or expectation was never realized from 1937 to 1945. The only sale of any of these properties was the one made in 1945 to one Ergenbright, one of his employees. (R. 53.) While he may have held the properties for sale, it was not "primarily for sale to customers in the ordinary course of his trade or business," within the meaning of Section 117 (a)(1) of the Internal Revenue Code. He did not or could not prove any activity from which the Tax Court or this Court could find that he was engaged in a trade or business with respect to the literary properties. Neither did he show that these properties constituted stock in trade or property of a kind which would properly be included in inventory.

This Court has frequently ruled that the kind of question here presented is essentially one of fact for resolution by the Tax Court. *Richards* v. *Commissioner,* 81 F. 2d 369, 370; *Field* v. *Commissioner,* 180 F. 2d 170; *Rubino* v. *Commissioner,* 186 F. 2d 304, cer-

tiorari denied, 342 U. S. 814; *Rollingwood Corp.* v. *Commissioner,* 190 F. 2d 263, 265. There has been no demonstration that the Tax Court failed to apply the proper legal standards or that it failed to appraise all the evidence. Well established principles require that its decision should be affirmed.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
HILBERT P. ZARKY,
DAVIS W. MORTON, JR.,
Special Assistants to the Attorney General.

MAY, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

* * * * *

(c) *Inventories.*—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

* * * * *

(k) [As added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree or divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written

instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * * *

(u) [As added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such hus-

band's gross income, no deduction shall be allowed with respect to such payment under this subsection.

(26 U.S.C. 1946 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) *Capital Assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l);

* * * * *

(5) [As amended by Sec. 150(a)(1) of the Revenue Act of 1942, *supra*] *Long-term Capital Loss.*—The term "long-term capital loss" means loss from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such loss is taken into account in computing net income;

* * * * *

(b) [As amended by Sec. 150(c) of the Revenue Act of 1942, *supra*] *Percentage Taken Into Account.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange

of a capital asset shall be taken into account in computing net capital gain, net capital loss, and net income:

100 per centum if the capital asset has been held for not more than 6 months;

50 per centum if the capital asset has been held for more than 6 months.

* * * * *

(d) [As amended by Sec. 150(c) of the Revenue Act of 1942, *supra*] *Limitation on Capital Losses.*—

(1) *Corporations.*—In the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges.

(2) *Other Taxpayers.*—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of $1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets.

* * * * *

(26 U.S.C. 1946 ed., Sec. 117.)

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No. 14204.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
6253 Hollywood Boulevard,
Los Angeles 28, California;

W. I. GILBERT, JR.,
458 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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REPLY BRIEF FOR PETITIONER.

Since the filing of petitioner's opening brief herein on April 28, 1954, this Court has rendered its decision in *Rudolf B. S. Myers v. Commissioner,* Case No. 13822, decided May 10, 1954. By said decision, this Court has concurred and joined with the 2nd and 3rd Circuits (*Baker v. Commissioner* (2d Cir.), 205 F. 2d 369; *Smith's Estate v. Commissioner* (3d Cir.), 208 F. 2d 349) in rejecting the reasoning which the Tax Court employed in the case at bar, as well as in the three cited cases, in holding that the alimony payments involved were not deductible by the husband-taxpayers concerned.

Upon the authority of these decisions, it is respectfully submitted that the decision of the Tax Court in this case holding that the alimony payments made by petitioner were not deductible by him should be reversed.

Respondent, in his brief at pages 22 and 23, in referring to the decision of this Court in *Rudolf B. S. Myers, supra,* states:

> "This Court, in its recent decision in *Myers v. Commissioner,* decided May 10, 1954, reversed the Tax Court and held that the payments were deductible by the husband where, as the taxpayer contended, the husband's obligation would cease upon the wife's remarriage or on the death of either party."

While the taxpayer in the *Myers* case did make such contentions, the language of this Court's decision indicates that it was not based upon these contentions of taxpayer, but rather was based upon the fact that no principal sum was specified in the agreement involved. The agreement in the *Myers* case, in paragraph seven thereof, provided that the husband would pay to his wife for her support "the sum of Two Hundred Fifty Dollars ($250.00) a month, in advance, during the period commencing on June 1, 1945, and continuing until May 31, 1951, * * *." The Tax Court, in reaching the conclusion that a principal sum was specified, reasoned that it was immaterial that the amount to be paid was set forth in specified monthly payments rather than as a total figure, relying upon its previous decisions in *Frank P. Orsatti,* 12 T. C. 188; *Harold M. Fleming,* 14 T. C. 1308, and *J. B. Steinel,* 10 T. C. 409. This Court, in reversing the Tax Court, did so for the clear and unequivocal reason expressed in the following language:

> "The Tax Court's holdings were clearly erroneous. No principal sum was specified in the seventh paragraph of the agreement of June 1, 1945. Therefore the 24 payments mentioned above were not installment payments discharging a part of an obligation the principal sum of which was so specified."

This language is equally applicable to the case at bar, except that in the case at bar the decree superseded the property settlement agreement of the parties, and there was no principal sum specified in said decree. It is to be noted that whereas in the *Myers* case the divorce decrees merely "approved, and required the parties to comply with, the agreement of June 1, 1945," in the case at bar the decree went further and actually adopted and made the agreement a part of the decree [R. 108]. Under the decisions referred to in petitioner's opening brief at pages 31 and 32, it is clear that the property settlement agreement and the promissory notes executed as a part thereof were merged into and superseded by the decree, and that the decree and not the property settlement agreement determined and fixed the rights and obligations of the parties. Respondent, in his brief, has not questioned petitioner's argument and authorities in this respect. The Tax Court itself has recognized this principle in numerous cases involving the interpretation and application of the federal estate tax.

In *Edythe C. Young,* 39 B. T. A. 230, at 234 and 235, the Court stated in part:

> "Even if the parties have settled their property rights, and have made provision for the support of the wife by a written agreement, the court may disregard the agreement and award such alimony as it deems right. In such case the right to alimony is predicated on the action of the court and not upon the agreement of the parties. * * *
>
> * * * * * * * *
>
> "* * * Neither the obligation, nor the amount thereof, was created or determined by the agreement of the parties. The law imposed the one and the decree of court determined the other."

See, also, *Estate of Maresi,* 6 T. C. 582 (and numerous cases therein cited), affirmed in *Commissioner of Internal Revenue v. Maresi* (2d Cir.), 156 F. 2d 929, wherein the Court of Appeals concluded that alimony allowances are founded upon the decree of the Court and not the agreement of the parties, where the agreement is incorporated into the decree of divorce. This conclusion was approved by the United States Supreme Court, in *Harris v. Commissioner,* 340 U. S. 106, 71 S. Ct. 181, at 184, wherein the Court stated:

> "The decree, and not the arrangement submitted to the court, would fix the rights and obligations of the parties. That was the theory of Commissioner of Internal Revenue v. Maresi, 2 Cir., 156 F. 2d 929, and we think it sound."

The respondent, in his brief at page 21, concedes that in this case neither the decree nor the agreement specified a principal sum, stating as follows:

> "Consequently, although *the agreement of the parties and the divorce decree* did *not* state the ultimate amount payable, the taxpayer had a simple, unconditional obligation to pay to his wife a total of $26,500 through monthly payments of $500 extending over a 53-month period." (Emphasis ours.)

This concession brings the instant case squarely within the holding of this Court in the *Myers* case, even though the respondent seeks to ignore the undisputable fact that the decree ordered the payment of a *single* monthly sum of not more than $800 nor less than $500 per month, during the prescribed period [R. 107].

Whereas the agreement in the *Myers* case specified an obligation to pay the sum of $500 per month, free from

any conditions which might change the amount of any particular monthly payment, the decree in the case at bar is far more flexible, variable and uncertain in its requirements in that under its terms it was contemplated that the amount of each monthly payment might fluctuate and change, depending upon the petitioner's earnings from his radio employment.

To the extent that the Court's decision in the *Myers* case might have been induced, if at all, by the taxpayer's contentions that his obligation would cease upon the wife's remarriage or on the death of either party, such contentions are equally applicable to the case at bar. The decree provides for the payments to be made to the taxpayer's former wife, and there is nothing in the decree which indicates that payments would be continued in the event that the wife remarried or either of the parties died prior to the completion of such payments. (See, 27 C. J. S. 999, 1090; *Foy v. Smith's Estate,* 58 Nev. 371, 81 P. 2d 1065; Nevada Compiled Laws 1929, Sec. 9465.)

However, it is unnecessary to consider these questions in this case in view of the fact, first, that the decree did not specify a principal sum and, secondly, the monthly payments which were required by the decree were expressly subject to condition and fluctuation as to amount, depending upon the future income of the petitioner.

It is therefore respectfully submitted that the monthly payments made by the petitioner in this case to Mrs. Fidler commencing with the month of April, 1944, through and including the month of December, 1946, were periodic payments received by Mrs. Fidler subsequent to the decree of March 20, 1944, in discharge of an obligation which, because of the marital relationship, was imposed upon and incurred by petitioner under the decree of March

20, 1944. Therefore, they were includible in Mrs. Fidler's gross income and were deductible in computing petitioner's net income for 1944, 1945 and 1946.

With respect to the loss which petitioner sustained in connection with the sale of literary properties, the evidence is undisputed that petitioner purchased said properties with the intention and purpose of immediately offering them for sale to prospective purchasers thereof. He received no income from said properties during the time that he held them. He did not acquire them with the intent to hold them while they appreciated in value, so as to be able to sell them at a later date and realize the appreciation in value which might have occurred in the meantime. It was his intention to immediately offer them for sale, and he did so, through the offices of his agent, Mr. Bentel. Under the authorities cited in petitioner's opening brief, the important factor in cases of this kind is the intent with which and the purpose for which the property is acquired and held. The fact that petitioner was wholly unsuccessful in his efforts to sell in any of the properties does not necessarily mean that such properties constituted capital assets.

Under the authorities cited in petitioner's opening brief, it is expressly submitted that the holding of the Tax Court with respect to this issue is also erroneous and should be reversed by this Court as being contrary to the undisputed evidence introduced in the trial of this case.

Respectfully submitted,

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
W. I. GILBERT, JR.,
Counsel for Petitioner.

No. 14,204

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. FIDLER,

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vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF JAMES M. FIDLER FOR REHEARING.

ZAGON, AARON & SANDLER,
By NELSON ROSEN,
6253 Hollywood Boulevard,
Los Angeles 28, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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PETITION OF JAMES M. FIDLER FOR REHEARING.

To the Honorable Judges Fee and Chambers, Circuit Judges, and Ling, District Judge, of the Above Entitled Court:

Your petitioner, James M. Fidler, is grateful to the Court for that portion of its opinion and judgment rendered herein on March 1, 1955, which holds that $300.00 of each monthly payment involved constituted periodic payments. Your petitioner, however, respectfully requests a rehearing of that portion of the opinion and judgment which holds that the Tax Court was correct in its conclusion "that to the extent of $500.00 a month petitioner's payments are 'installment payments' and therefore not deductible." (Op. p. 7.)

As grounds for said rehearing, your petitioner believes and respectfully submits that said opinion and judgment in reaching said conclusion is erroneous in the following respects:

1. The opinion erroneously holds that the $12,000.00 promissory note involved was a negotiable instrument in strict form, payable absolutely and without contingency, whereas, said note was actually payable to "Roberta L. Fidler, only," was non-negotiable, and was contingent because the payments thereunder were subject to termination in the event of the death of either Mrs. Fidler or petitioner, and probably were subject to termination in the event of Mrs. Fidler's remarriage.

2. The opinion overlooks the fact that the $18,000.00 note, even though negotiable in form, was also subject to the same contingencies.

3. The opinion erroneously holds that the payments of $300.00 per month and $500.00 per month provided by the notes were entirely separate and distinct in purpose and character, whereas in fact, they were of a single character and had but one common purpose.

The opinion erroneously considered each note separately, and failed to consider the three notes, in the aggregate, in determining whether petitioner's alimony or separate maintenance obligation was specified in a principal and fixed sum.

4. In an effort to avoid the controlling effect of the divorce decree which did not specify petitioner's alimony or separate maintenance obligation in a principal sum, the opinion erroneously holds that the principal amounts of the notes were incorporated into the decree by reference.

ARGUMENT AND AUTHORITIES.

In reaching the conclusion that the $500.00 monthly payments contemplated under the $18,000.00 and $12,000.00 notes were installment payments of fixed principal sums, the opinion stresses the negotiable nature of said instruments, stating in part as follows:

> "* * * the promissory notes for $18,000.00 and $12,000.00, which were payable in installments of $500.00 per month under the decree, were negotiable instruments in strict form and would have been payable absolutely in the hands of a bona fide holder for value." (Op. p. 6.)
>
> * * * * * * * *
>
> "The amount of $12,000.00, payable in installments of $500.00 from September 1, 1946, was also an established principal sum. It is set up without contingency in the agreement of February 4, 1944, which required that the fixed sum be evidenced by a fully negotiable instrument, which was delivered." (Op. p. 7.)

On the other hand, and with respect to the $16,200.00 note, which provided for monthly amounts not to exceed $300.00, the opinion states (p. 6):

> "The 'note' for the aggregate which might be paid in the event the contingency was favorable each month is plainly not a 'negotiable instrument.'"

The $12,000.00 Note Was Not Negotiable.

Petitioner respectfully submits that although the $18,000.00 note was in negotiable form, the $12,000.00 note as well as the $16,200.00 note were not negotiable.

The $18,000.00 note was payable to "Roberta L. Fidler, *or order.*" It provided for acceleration, in the event of default, at the option of the "holder" thereof.

But, the $12,000.00 note (as well as the $16,200.00 note) was payable to "Roberta L. Fidler, *only.*" And, it provided for acceleration in the event of default only at the option of "Roberta L. Fidler."

In order for a promissory note or other instrument to be negotiable, it "Must be payable to order or to bearer."

Cal. Civ. Code, Sec. 3082(4);
8 Cal. Jur. 2d 354;
10 C. J. S. 573.

Clearly therefore, the $12,000.00 note lacked this essential attribute of negotiability and fell into the same non-negotiable classification as the $16,200.00 note.

The Monthly Payments Under the $12,000.00 Note Were Subject to Termination in the Event of the Death of Either Mrs. Fidler or Petitioner.

The $12,000.00 note and the full amount of $12,000.00 was not payable absolutely and free of contingency. Although no contingencies were actually expressed therein, in the final form in which it was incorporated in the agreement of February 4, 1944, there were certain contingencies which the law created and implied. If Mrs. Fidler had died within the 24 months period during which the $500.00 monthly payments fell due under said note and prior to the full payment of the $12,000.00, Mr. Fidler's obligation to make further payments would have immediately terminated and ceased. This is true because the $500.00 monthly payments under said note and agreement were founded upon and in partial satisfaction of the legal obligation which the law imposed upon petitioner to support his wife, and that obligation would have come to an end upon the death of Mrs. Fidler irrespective of whether the full $12,000.00 provided as the maximum payable under said note had in fact been paid or not.

It cannot be disputed that the payments under this note, as well as those under the $18,000.00 and $16,200.00 notes, were for one and only one purpose, namely, to provide for the support and maintenance of Mrs. Fidler. The agreement of the parties establishes this beyond doubt, in paragraph Seventh thereof [Tr. p. 71]. The Tax Court so found in its Findings of Fact [Tr. pp. 137, 138]. These payments were clearly in the nature of alimony, for the support and maintenance of petitioner's wife, and were entirely separate and distinct from the provisions of paragraph Sixth of the agreement [Tr. p. 69] which divided the property of the parties between them.

If the California law governs in the interpretation of the agreement as the parties provided by paragraph Twenty-Fourth [Tr. p. 83], then the payments under the $12,000.00 note were contingent upon Mrs. Fidler remaining alive during the payment thereof, and had she died, petitioner's obligation to make further payments would have come to an end. The California courts hold that the obligation to pay alimony and support ceases to be effective upon the death of *either* spouse.

> *Roberts v. Higgins,* 122 Cal. App. 170, 9 P. 2d 517.

This Court has itself held that the death of the wife would terminate the payments and therefore render the husband's obligation contingent and not specified in a principal sum, in *Davidson v. Commissioner,* No. 13,767, decided January 27, 1955, ... F. 2d ....., where, in considering a similar question involving a California property settlement and divorce decree, the Court said:

> "This contention ignores the possibility that the wife may either die or remarry before the expira-

> tion of the period delineated in the decree. In either event the payments would terminate. The existence of these contingencies makes it impossible to determine in advance with any degree of accuracy the amount to be paid under the decree. Section 22(k) clearly contemplates an amount definite in nature."

As to this aspect of the case, there is no difference in principle between the *Davidson* case and the case at bar. The agreement and decree in the *Davidson* case also failed to expressly provide that the payments should terminate in the event of the wife's death, but this Court nevertheless held that such contingency was present and therefore rendered the total amount payable uncertain.

Nor should the *Davidson* case be distinguished from the case at bar merely because in the case at bar the total amount to be paid under this note in the event that the contingency did not occur, namely, $12,000.00, was set forth in the note and agreement, whereas in the Davidson agreement the total amount to be paid was not set forth. In *J. B. Steinel,* 10 T. C. 409, the Tax Court, in attempting to ignore the contingencies involved, attempted to rely upon the fact that the total amount to be paid if the contingencies did not take place was actually stated in the document. This reasoning was held to be unsound in *Baker v. Commissioner* (1953, 2nd Cir), 205 F. 2d 369, and *Smith's Estate v. Commissioner* (1953, 2nd Cir.), 208 F. 2d 349, when said Courts repudiated the rule of the *Steinel* and similar cases. The *Smith* and *Baker* decisions are cited with approval in this Court's decision in the *Davidson* case.

Thus, under the *Davidson* case and the California decisions, the payments were clearly subject to the contingency of the wife's death and would have terminated and ceased in the event of her death. The same rule applies in Nevada, where the divorce decree herein was actually rendered. In *Foy v. Smith's Estate,* 58 Nev. 371, 81 P. 2d 1065, the Nevada Supreme Court, in holding that the right to support terminated upon the death of the wife, reasoned in part as follows (81 P. 2d 1065, at 1067):

> "* * * the right to support was purely personal. From the very nature of the right it could be nothing more. It was a right which she (the wife) alone could enjoy. Its duration depended upon her survival. There can be no support for a non-existing person."

The foregoing contention is strengthened by the fact that the monthly payments under the $12,000.00 note (as well as the $16,200.00 note) were payable to Roberta L. Fidler, *only.* The word "only" cannot be ignored. The payments were personal, in nature, to her alone. If she had died, neither her estate, her personal representative nor any one else, under this express language, would have been entitled to receive further payments. This is a reasonable construction. The payments were for her support and maintenance. Upon her death, the necessity for such payments would have ceased, and the legal obligation of petitioner to support her would have come to an end.

The Death of Petitioner Would Have Terminated the Payments Under the $12,000.00 Note.

Still another contingency which would have terminated the payments under said $12,000.00 note would have been the death of petitioner.

Roberts v. Higgins, supra, 122 Cal. App. 170, 9 P. 2d 517;

27 C. J. S. p. 999;

Smith's Estate v. Comm'r, supra, 208 F. 2d 349.

The Remarriage of Mrs. Fidler Was Also a Contingency Which Would Have Affected Petitioner's Obligation to Continue the $500.00 Monthly Payments Under the $12,000.00 Note.

In petitioner's reply brief herein, at page 5, reference was made to the fact that the death of either Mrs. Fidler or petitioner as well as the remarriage of Mrs. Fidler would have terminated the payments under the decree.

If, as petitioner has contended, the obligations of petitioner under the agreement and promissory notes were superseded by and merged into the divorce decree which spelled out in precise terms and amounts the monthly payments to be made, then, under Nevada law, the remarriage of Mrs. Fidler would have terminated Mr. Fidler's obligation to continue to make payments. (Nevada Compiled Laws (1929), Sec. 9465; 27 C. J. S. p. 1090.) However, if the precise payments as ordered by the decree are ignored and if instead reference is made to the agreement and the notes themselves, a careful analysis and examination thereof will reveal that there is nothing in

the agreement nor in the notes which expressly obligated the petitioner to continue to make the support and maintenance payments to Mrs. Fidler in the event of her remarriage.

The California statute, in force at the time of this agreement, which prescribed the nature and extent of the obligation of a husband to support his divorced wife, provided that he might be compelled to make suitable allowance for her support, during her life or for such a shorter period as the Court might deem just, and concluded with this express provision:

> "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support * * *" (Cal. Civ. Code, Sec. 139.)

This statutory provision is declaratory of the common law rule.

> *Hansen v. Hansen,* 93 Cal. App. 2d 568, 209 P. 2d 626;
>
> *Stucker v. Katz,* 92 Cal. App. 2d 843, 207 P. 2d 879;
>
> 27 C. J. S. p. 1090.

The condition which was specified in the note for $12,000.00 as prepared under the original agreement of August 20, 1943 (and to which the Court has referred in its opinion at p. 7, footnote 4), did no more than to incorporate the common law and statutory rule above set forth, save and except that the language of the condition as stated went further and would have terminated future payments even though Ruth Fidler had purportedly en-

tered into a marriage which was not, in fact, valid. To this extent, the proviso may have given petitioner more protection than otherwise, because the rule as codified in Section 139 might not have relieved the husband of his obligation in the event that the wife had entered into a purported new marriage which was not in law a valid one.

However, the elimination of the proviso originally contained in the $12,000.00 note did not make inapplicable the statutory rule above referred to, and this statute by implication and operation of law constituted a qualification of petitioner's obligation.

Cf.:

Hansen v. Hansen, supra.

It is, therefore, respectfully submitted that the $12,000.00 note was not a negotiable note and was not payable absolutely and free of any contingencies. It was payable *only* to Mrs. Fidler. The obligation to continue payments thereunder would undoubtedly have been terminated by her death, or by the death of Mr. Fidler, and in all probability would have been terminated in the event of her remarriage. For these reasons, it, and the $500.00 monthly payments falling due under it, should be considered in the same contingent category as the $16,200.00 note.

The Aforesaid Contingencies Were Also Applicable to the $18,000.00 Note, While Said Note Was Held by Mrs. Fidler.

The $12,000.00 note, as above pointed out, because it was made payable to "Roberta L. Fidler only" was especially vulnerable to the contingency that Mrs. Fidler might die before full and complete payment thereof, in which event future payments would cease. However, on principle, the same contingencies above discussed with respect to the $12,000.00 note were likewise applicable to the $18,000.00 note, *so long as said note was not negotiated to a bona fide holder for value.* It might very well be true, as the Court stresses in its opinion, that if this note had been negotiated by Mrs. Fidler to a bona fide purchaser for value, said purchaser could have enforced it against Mr. Fidler irrespective of the occurrence of any of the contingencies above set forth. But, the rights of a bona fide holder for value are not involved. The fact remains that the note was continuously held by Mrs. Fidler, if it be assumed that it was not merged into and superseded by the divorce decree. The payments provided therefor were, as hereinbefore demonstrated and as found by the Tax Court, in the nature of alimony and for her support and maintenance. There is nothing in the agreement, nor in the provisions of the note itself, which provides that the obligation of Mr. Fidler to make payments thereunder in satisfaction of his legal obligation to support and maintain her should continue after her death, when the necessity for such support and maintenance would have completely ceased. The same is true with respect to the other contingencies.

The Three Notes Involved Were Not "Entirely Separate and Distinct in Purpose and Character," as the Opinion Herein Holds.

The Opinion Erroneously Considered Each Note Separately, and Failed to Consider the Three Notes, in the Aggregate, in Determining Whether Petitioner's Alimony or Separate Maintenance Obligation Was Specified in a Principal and Fixed Sum.

Petitioner respectfully submits that the payments of $300.00 per month and $500.00 per month provided for by the notes were not "entirely separate and distinct in purpose and character," as the opinion herein holds at page 4. To the contrary, they were but of a single character and had but one common purpose. In character, they were alimony payments, and, as to purpose, they all had one and the same, namely, to state and provide the money which Mr. Fidler would have to pay to his wife in fulfillment of his legal obligation to support and maintain her. None of said notes was intended to provide payment of property rights but all were founded upon and each was intended to provide money payments in satisfaction of petitioner's "alimony or separate maintenance obligation."

The Court, in its opinion at page 8, calls attention to the sentence which appears in Section 22(k) of the Internal Revenue Code and which reads as follows:

> "Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument, shall not be considered periodic payments."

In determining what Congress intended by the word "obligation" as used in said sentence, it is necessary to

read and construe said sentence in conjunction with the preceding sentences in said Section. Only by so doing can it be determined what "obligation" Congress had in mind when it referred to installment payments discharging a part of an obligation the principal sum of which is specified.

The preceding portions of Section 22(k) read as follows:

> "(k) Alimony, Etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or prop-

erty, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; * * *"

Is it not reasonable to conclude, from the entire paragraph, that the "obligation" referred to in the sentence quoted by the Court is the previously referred to "legal obligation which, because of the marital or family relationship, is imposed or incurred by such husband?"

The legal obligation referred to is further limited to that which arises out of the general obligation of the husband to support his wife.

The Treasury Regulations promulgated by the Bureau of Internal Revenue under the Internal Revenue Code so provide.

Treasury Regulations 111, which were in effect at the time of the agreement involved herein, provided in part as follows:

"Sec. 29.22(k)-1. *Alimony and separate maintenance payments—Income to former wife—(a) In General.* (1) Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. * * *

* * * * * * * *

"(5) Section 22(k) applies only where the legal obligation being discharged arises out of the family or marital relationship *in recognition of the general obligation to support*, which is made specific by the instrument or decree. * * *" (Emphasis ours.)

The same construction and interpretation is stated in the House Report of Congress, referred to in petitioner's

opening brief at page 22, wherein the Congressional Committee in part stated, with respect to the effect of Section 22(k) as follows:

> "This treatment is provided only in cases of divorce or legal separation and applies only where the *alimony or separate maintenance obligation* is discharged in periodic payments." (Italics added.)

When the foregoing are considered, it is apparent that the word "obligation" as utilized in the particular sentence in question, refers to "the alimony or separate maintenance obligation" (in the language of the Congressional Committee) which the law imposes upon the husband by reason of the marital relationship.

In other words, it is submitted that the quoted sentence in question should be construed as if it read as follows:

> "Installment payments discharging a part of the alimony or separate maintenance obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments."

Under this interpretation, the question in this case would be: was the amount which Mr. Fidler agreed to pay to his wife in discharge of the alimony or separate maintenance obligation specified as a principal sum?

In order to answer this, it would be necessary to consider the agreement and the three notes, as a whole and together, rather than separately, because only by calculating the aggregate sums to be paid under all three notes can we attempt to ascertain whether or not Mr. Fidler's alimony or separate maintenance obligation to his wife has been specified in a principal and fixed sum. Each of the notes were intended to supply payments in but

partial satisfaction of the total alimony or separate maintenance obligation.

Petitioner again respectfully urges, as he did in his opening brief herein at page 39, that in determining whether Mr. Fidler's obligation, within the meaning and contemplation of Section 22(k), was specified in a principal sum in the instruments or decree, it is necessary to consider the notes as a group. They were intimately related in such way that they together, and with the agreement of which they were a part, provided continued regular monthly payments of money for current maintenance and support of Mrs. Fidler in an amount not less than $500.00 per month nor more than $800.00 per month. They, together, made up the petitioner's alimony or separate maintenance obligation.

It was Mrs. Fidler's own attorney, who in the first instance, prepared the decree which "lumped" the payments due under the series of notes into one monthly payment of $800.00 per month, at the time the original divorce decree was entered. Mrs. Fidler, through her attorney, recognized that notwithstanding the form of the notes, the substance and effect thereof was to entitle her to a single monthly payment for her support and maintenance not to exceed $800.00 per month.

In the words of the Third Circuit Court, in *Smith's Estate v. Commissioner, supra,* 208 F. 2d 349, these notes, and the agreement pursuant to which they were executed, when read and interpreted in relation to each other, constituted "the month-to-month kind of payment for support in which the Congress was seeking relief for alimony-paying ex-husbands."

The notes should not be viewed and treated as isolated and separate undertakings. We again respectfully refer

the Court, on this aspect, to the views stated by Judge Hastie, in *Smith's Estate v. Commissioner, supra,* extracts of which are quoted in petitioner's opening brief at pages 48, 49.

The opinion herein states, at page 9, that:

> "In going over the negotiations, it is difficult to escape the idea that the wife was insistent upon the fixed principal sums of $18,000.00 and $12,000.00 and that petitioner finally agreed thereto."

We submit that the history of the negotiations emphasize a different purpose. Taken as a whole, they show that the principal thing which the wife was striving for (in addition to her share of the property of the parties) was an assurance that she would receive from petitioner a minimum of $500.00 per month for her support and maintenance. She likewise wanted some assurance that those payments would be made promptly when due, and in order to insure punctual payment thereof and to deter petitioner from permitting any monthly payment to become delinquent, the acceleration clause was put into the notes. Mr. Fidler was thereupon put upon notice and in such position that if he defaulted in any payment, he faced an immediate action for the remaining maximum balance stipulated in the note. This, the negotiations would indicate, was the motivating factor underlying these notes. And, finally, after further negotiations, the wife succeeded in getting the ultimate arrangement whereby she was assured of a minimum of $500.00 per month for her support and maintenance with the right to receive as much as $800.00 per month if Mr. Fidler's income from his radio employment remained at the same level.

That the principal purpose and intention of the parties, as set forth in the final agreement of February 4, 1944,

was to provide Mrs. Fidler with a minimum of $500.00 and a maximum of $800.00 per month for her support and maintenance (as distinguished from paying her "fixed principal sums of $18,000.00 and $12,000.00" as the opinion states) is conclusively established and demonstrated by the very language of paragraph Eighth of the agreement [Tr. pp. 75 and 76].

The Fixed Amounts Set Forth in the Promissory Notes Were Not Specified in the Divorce Decree as Principal Sums by Reference.

One of petitioner's principal contentions herein has been that the divorce decree superseded the property settlement agreement and notes executed as a part thereof, and that the decree controlled in determining the measure and extent of petitioner's obligation to make the monthly payments originally contemplated by the agreement and notes. Petitioner has in his briefs herein cited numerous authorities recognizing the basic principle that the decree is controlling, including the decision by the Supreme Court in *Harris v. Commissioner,* 340 U. S. 106, 71 S. Ct. 181. In answer to this contention, the opinion herein states at page 8:

> "If the rule be adopted that the 'decree' is controlling, as some opinions say, still each of these principal sums was specified therein because of the incorporation of these fixed amounts by reference. There may be more exact methods of specifying a principal sum in terms of money, but none readily suggests itself."

Petitioner asks, how can it be reasonably concluded that there was an incorporation of the "fixed sums" by reference when the divorce court actually spelled out and specified the exact payments to be made each month, and thus specifically covered the subject matter involved with-

out making any reference whatsoever to the total sums set forth in the notes? Having undertaken to spell out, as a part of its order, the exact amounts to be paid by petitioner (as distinguished from merely referring to and incorporating the agreement), the court covered this particular aspect of petitioner's obligations under the agreement, and the decree measured and stated the extent and amount of his alimony obligation.

Such incorporation of the notes' "fixed sums" might have occurred if the decree in this case had merely stopped with the paragraph (quoted at page 2 of the opinion) whereby the Court ordered that the settlement agreement be confirmed, ratified, approved and adopted as a part of the decree. Or, more simply and clearly, such incorporation by reference of the fixed sums would have occurred if the decree had added to said paragraph language substantially as follows:

> "And, the defendant is ordered to pay the promissory notes referred to in said settlement agreement in the amounts of $18,000.00, $12,000.00 and $16,200.00, in accordance with the terms and provisions thereof."

Under either of the foregoing methods, it could be reasonably concluded that the fixed amounts provided by the notes had been made part of the decree by reference. The latter clause above suggested especially would have been a very simple and easy method of making such incorporation by reference.

But, the decree did not do this—it undertook to spell out in exact dollars the exact amount which petitioner was ordered to pay each month, without any reference whatsoever to the maximium amounts specified in the notes, and it in effect constituted an order to make those exact pay-

ments which order the petitioner was compelled to comply with, irrespective of whether it was consistent or inconsistent, with the terms of the various notes. The decree may have varied, in some degree and respects, from the precise terms and provisions of the note. Yet the decree is what governs and controls in the event of any difference between the terms thereof and the terms of the promissory notes.

Even though the decree may not have fully reflected the actual agreement of the parties with respect to the payments to be made, nevertheless, this was the judicial action of the Court, and if the Court's order were in any way erroneous, it was judicial error which has become final.

In this regard, there is no substantial inconsistency between the notes and the decree. The divorce court, as well as Mrs. Fidler's counsel, recognized that in specifying Mr. Fidler's alimony obligation, it was necessary, reasonable and proper to consider all three notes, as a unit, and not to regard them as separate or isolated undertakings, in arriving at the monthly amounts to be paid by petitioner to his wife for her support and maintenance.

The necessary conclusion that the divorce decree's specification of payments is controlling is not changed by that paragraph of the decree (which the opinion quotes at the bottom of page 2) requiring the parties to comply with those "executory provisions" of the agreement which were *not* incorporated in the decree in a plenary manner. The decree did, fully and specifically, cover the subject matter of the monthly payments.

Likewise, paragraph Twentieth of the Agreement, referred to in the opinion at page 7, footnote 3, dealing with the right of Mrs. Fidler to legally proceed against any

property of the petitioner for the purpose of enforcing the terms of the promissory notes—does not affect the controlling effect of the decree, after it was entered. Certainly, until a divorce decree had been entered between the parties and had adjudged the monthly payments to be made, Mrs. Fidler would have had her action at law on the promissory notes to enforce their payment. But, once the decree was rendered and Mr. Fidler was ordered to make the monthly payments, the decree superseded the notes and agreement and became controlling.

By the decree, Mrs. Fidler gained a more powerful way to compel immediate and punctual payment of the monthly sums than she had possessed under the notes—she now had the right to have petitioner punished for contempt and, if necessary, imprisoned if he failed to make the payments when due.

The agreement of the parties did not provide that it or the notes should *survive* and exist after a divorce decree adopting same had been entered between the parties. Even if it had so provided, the decree would still have controlled.

Harris v. Commissioner, supra.

In this connection, it must be remembered that until a divorce decree or decree of separation was rendered between the parties, Section 22(k) never came into operation, irrespective of whether there were any payments made before such decree, and irrespective of what kind of an agreement the parties may have made. Section 22(k) operates only with respect to payments made *subsequent to the decree.* The rendition of the decree is all important, and the decree is the document which creates the rights and duties, irrespective of whether it follows in detail the terms of the agreement.

As the Supreme Court stated in *Harris v. Commissioner, supra,* at 71 S. Ct. 181, 184:

> "* * * The happenstance that the divorce court might approve the entire settlement, or modify it in unsubstantial details, or work out material changes seems to us unimportant. *In each case it is the decree that creates the rights and duties;* . . ." (Emphasis added.)

And, having undertaken, in specific language, to order petitioner to make certain payments, the decree governs, and modifies the notes to the extent that there is any inconsistency.

Subsequent to the entry of the decree, Mrs. Fidler would not have had any right of action on either the notes or on the property settlement agreement which was incorporated and made an operative part of the decree, but her sole remedy would have been on the decree, including such aids as execution, contempt and other enforcement process of the Court, together with an action on the decree.

Hough v. Hough, 26 Cal. 2d 605, 160 P. 2d 15.

If the decree is controlling, then there was no principal sum specified therein and this case falls squarely within the rule announced by this Court in *Myers v. Commissioner,* 212 F. 2d 448.

If the Court agrees that the decree is controlling but still believes that each of the principal amounts set forth in the notes were incorporated into the decree by reference, then for reasons above set forth, the notes should be viewed together and in the aggregate in determining whether the three of them did fix and specify Mr. Fidler's alimony obligation in a "principal sum." By reason of the contingency expressed in the $16,200.00 note as well as the

other contingencies which affected all three notes, no such principal sum can be spelled out.

Davidson v. Commissioner, supra.

If, notwithstanding the foregoing, the Court still feels that the negotiable nature of the notes is to be the standard by which this case should be determined, then we respectfully submit that the $12,000.00 note—which was clearly a non-negotiable instrument—must be placed in the same status as the $16,200.00 note, and the $500.00 payments contemplated under said $12,000.00 note must also be considered as "periodic payments."

Conclusion.

Petitioner respectfully submits that this petition for rehearing should be granted, and that for the reasons hereinabove stated, this Court should determine that the entire amount of each $800.00 monthly payment involved constituted a periodic payment within the provisions of Section 22(k) of the Internal Revenue Code.

However, and irrespective of whatever treatment may be accorded to the $500.00 monthly payments originally contemplated under the $18,000.00 note, it is clear that the $12,000.00 note was not a negotiable instrument and was subject to contingencies which rendered the total amount to be paid thereunder uncertain and indefinite, and the payments under this note should also be construed as periodic payments under said Section.

Respectfully submitted,

ZAGON, AARON & SANDLER,

By NELSON ROSEN,

Counsel for Petitioner.

Certificate of Counsel.

I, Nelson Rosen, state that I am a member of the law firm of Zagon, Aaron & Sandler, and I am one of counsel for petitioner herein. I have prepared the foregoing petition for rehearing and certify that in my judgment it is well founded and that it is not interposed for delay.

NELSON ROSEN.

No. 14205

United States
Court of Appeals
for the Ninth Circuit

S. B. TRESSLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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APPEARANCES

For Petitioner:

JOSEPH A. FITZSIMMONS, Esq.

For Respondent:

F. L. VAN HAAFTEN, Esq.
R. C. WHITLEY, Esq.

The Tax Court of the United States

Docket Nos. 29044, 35129

S. B. TRESSLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Tietjens, Judge: The respondent determined deficiencies in income tax of $701.07 for 1946 and $936.29 for 1947. By amended pleadings these deficiencies have been increased to $2,239.64 and $3,967.15, respectively.

The questions for decision involve the proper treatment of the income of rental properties in the hands of a receiver appointed by a Florida court and expenditures made by the receiver. Also involved are claimed deductions for certain legal expenses; payments made to the petitioner's wife from

the income of the receivership pursuant to court order and claimed as deductible under sections 22(k) and 23(u); the computation of capital gain on the sale of an apartment house; the allowance of depreciation on the properties in receivership; and whether the deficiency notice for 1947 was timely. A number of alternative contentions are made by both parties. No useful purpose would be served by setting out all the contentions in detail in this preliminary statement. They will be treated more fully in the opinion.

Findings of Fact

The petitioner is an individual residing in Reno, Nevada. His income tax returns for 1946 and 1947 were filed on the cash basis with the collector at Reno, Nevada. For 1947 the petitioner underestimated his tax on Form 1040-ES filed March 15, 1947, and an amended Form 1040-ES filed September 15, 1947. He filed his final return for 1947 on Form 1040 on January 12, 1948. The notice of deficiency for 1947 was dated March 14, 1951.

In August 1944 the petitioner married Ada Zoeller Tressler in Garrett County, Maryland. On their honeymoon the couple visited in Reno with the petitioner's sons Norman and Kenneth. From there they went to California and later to Florida to spend the winter.

During the early months of 1945, while married to Ada and living with her, the petitioner purchased several parcels of real estate in Broward County, Florida which included two apartment

houses known as Maxwell Court Apartments and Tarpon River Apartments. Title to the apartment houses was taken in the name of the petitioner's son, Kenneth, and title to the other properties was taken in the joint names of Ada and the petitioner. The Maxwell Court Apartments were purchased by the petitioner in January 1945 for the sum of $45,000. They consisted of eight furnished units. The land was valued at $3,600, furniture at $6,000, and the buildings at $35,400. The Tarpon River Apartments were purchased at the same time for the sum of $22,875. The land was valued at $2,200 and the furniture at $5,000, and the building consisting of four furnished units was valued at $15,675.

The petitioner owned property in addition to that described above, and the receivership hereafter mentioned did not include all his property.

On March 7, 1945, Ada filed in the Circuit Court of the Fifteenth Judicial Circuit in and for Broward County, Florida, a "Bill for Alimony Unconnected with Divorce" naming the petitioner, his son Kenneth, and Ruth Westerberg, individually, and as agent and employee of the petitioner, as defendants. The bill prayed for "temporary and permanent support and alimony unconnected with a divorce together with suit money and a reasonable amount with which to compensate her attorneys." Further, a declaratory decree was asked adjudging that the properties purchased in the name of Kenneth were held in trust for the petitioner, that the defendants be restrained from transferring and encumbering the properties, that a writ of sequestra-

tion issue, and that a receiver be appointed to take charge of the properties, collect the rents, and pay same into court to insure the payment of any sums that may be adjudged due and payable to Ada by the petitioner.

On March 13, 1945, the Florida court entered an order appointing Ruth Westerberg receiver for the two apartment properties, restraining Kenneth and the petitioner from transferring the properties, and directing the receiver to collect the rents, pay expenses of operation, and deposit the balance of the receipts in a bank subject to further court order.

On June 28, 1945, an order was entered making an allowance of $300 per month, retroactive to March 3, 1945, for temporary alimony and support of Ada and $2,000 temporary attorney fees, and court costs of $334.86. This order was appealed by Kenneth, but his appeal was denied.

On July 17, 1945, the petitioner was granted a divorce from Ada in an action begun by him May 7, 1945 in the Second Judicial District Court in Nevada. This action was uncontested by Ada. No provision for alimony was made in the decree.

In October 1945 Kenneth sought to file a further answer in the Florida proceedings in an effort to regain possession of the apartment properties and to plead therein the Nevada divorce decree. Kenneth was denied the right to file the answer. By order dated January 7, 1946, the Florida court decreed that the apartment properties purchased by the petitioner in the name of Kenneth were properties of the petitioner and held in trust for him

by Kenneth. Later in January the court ordered the receiver to pay the sum of $5,334.86. This amount was made up of three items: (1) $3,000 for accrued support of Ada from March 3, 1945 to January 3, 1946; (2) $2,000 temporary attorney fees; and (3) $334.86 costs.

An appeal from said orders was denied by the Florida Supreme Court and Kenneth took the matter to the United States Supreme Court. While that proceeding was pending, the petitioner himself began an action in a United States District Court in Florida against Ada, the receiver, et al., seeking recovery of his apartment properties held in receivership. A motion to dismiss was granted and an appeal was taken. While this appeal was pending and after the United States Supreme Court had denied certiorari in Kenneth's case the parties entered into a settlement agreement under which Ada acquired the Tarpon River Apartments and other properties and the petitioner retained the Maxwell Court Apartments. In accordance with the settlement agreement all the litigation above described was terminated and a decree was entered by the Florida court to the effect that the various court orders be marked satisfied and the properties be released from the receivership.

On August 31, 1947, the petitioner sold the Maxwell Court Apartments for $59,000.

A summary of the income and disposition of the rents collected, expenses paid, and disposition of the remaining funds by years by the receiver is shown in the following schedule:

	1945	1946	1947	Total
Rents collected	$7,393.50	$11,092.95	$2,410.00	$20,896.45
Expenses paid	2,992.91	3,199.48	2,269.50	8,461.89
Income after maintenance expenses	$4,400.59	$ 7,893.47	$ 140.50	$12,434.56
Other payments by receiver:				
Ada Tressler		$ 3,000.00	$ 984.69	$ 3,984.69
Davis & Lockhart, Attorney for Ada Tressler		2,000.00	2,862.55*	5,197.41
Ruth Westerberg, Receiver			1,559.46	1,559.46
			1,559.46	1,559.46
Hugh Lester, Attorney for Receiver			1,500.00	1,500.00
Court Costs		334.86	193.00	193.00
Total other payments by receiver		$ 5,334.86	$7,099.70	$12,434.56
Amount retained by receiver	$4,400.59	$ 2,558.61		

* This amount according to the court's order was for expenses and attorney fees "for services rendered to the Receiver, in all Federal Courts."

In connection with the litigation in the Florida and the United States Courts, the petitioner bore the expense of the legal representation for Kenneth and himself. For the year 1946 he claimed on his return a deduction of $1,425 for legal expenses and attorneys fees. By amended pleadings he now claims $5,500. For 1947 he claimed a deduction of $5,035 for such expenses. By amended pleadings he now claims $6,535.

The respondent determined a deficiency of $701.07 for 1946 based on disallowance of claimed legal expenses of $1,425 and depreciation of $1,-931.25. By amended answer the respondent increased the deficiency for 1946 to $2,239.64 based

on his contention that the petitioner realized additional income by reason of the payment of $5,334.86 made by the receiver to Ada under the January 17, 1946, order of the Florida court for support, attorney fees, and court costs.

The respondent determined a deficiency of $936.29 for 1947 as a result of the disallowance of the claimed deduction of $5,035 for attorney fees and an error of $1,000 (admitted by the petitioner) in computing net income. By amended answer this deficiency was increased to $3,967.15 partly based on the contention that the petitioner realized additional income by reason of payments amounting to $7,099.70 made by the receiver under final decree of the Florida court dated July 16, 1947. The increase also was occasioned by disallowance of $2,517.50 legal expenses which were added by the respondent to the cost of the Maxwell Court Apartments in computing the capital gain arising from the sale thereof. Another portion of the increase resulted from increasing the capital gain by offsetting depreciation for 1946 on the apartments in the sum of $1,246.

Opinion

Taxability to the Petitioner of Payments Made Under Court Order by Receiver

On brief the respondent argues that the following amounts paid by the receiver of the apartment properties under court order from the rental receipts thereof should be added to the petitioner's income:

	1946	1947
Ada Tressler	$3,000.00	$ 984.69
Attorneys for Ada Tressler	2,000.00	2,862.55
Attorneys for Receiver		1,500.00
Receiver's Fee		1,559.46
Court Costs	334.86	193.00
Totals	$5,334.86	$7,099.70

With regard to the $5,334.86 paid in 1946 we think the respondent is correct. Of this amount, $3,000 represented accrued temporary alimony and support for the petitioner's wife, Ada; $2,000 was for temporary fees awarded her attorneys, and the remainder went for court costs. These items all represent obligations imposed on the petitioner by the Florida court. These obligations were satisfied in 1946 by the application of funds derived from rentals from properties found by the Florida court to belong to the petitioner. They were personal obligations of his unconnected with the operation of the properties by the receiver. The petitioner was on a cash basis and no argument can be made that 1946 was not the proper year in which to tax him. It was then that he received the benefit of the funds under court order through discharge of his obligations to Ada arising out of her action against him. That he had no actual control of the funds and did not receive cash in hand is of no consequence.

We see the situation for 1947 somewhat differently. The $984.69 paid to Ada and the $193 court costs fall into the same categories as the 1946 payments and should properly be added to the petitioner's income in 1947. Not so the $2,862.55 which

the respondent treats as a payment to Ada's attorneys. An examination of the facts show that the Florida court ordered this amount paid to the attorneys in question not for services rendered to Ada in her attempt to collect support from the petitioner—rather, the payment was made, in the words of the court, "for services rendered to the Receiver, in all Federal Courts." This amount, then, went to attorneys who, while nominally in Ada's employ, were nevertheless instrumental in protecting the receivership itself from attack. That was a receivership expense and so far as we can see, should be so treated. We see no reason for sustaining the respondent in attempting to tax the petitioner with the $2,862.55 paid to attorneys for services rendered the receivership. The same can be said for the $1,500 paid to the attorney for the receiver. That, too, was a receivership expense and the petitioner should not be taxed with it. Like treatment should be accorded the receiver's fees.

The effect of our holding is that the petitioner is to be taxed only on the net income of the properties held by the receiver and then only in the year in which that income was applied for his benefit. Cf. North American Oil Consolidated vs. Burnet, 286 U.S. 417. Costs of the receiver in operating the receivership are not to be added to the petitioner's income.

The petitioner's contention that it was the duty of the receiver to file returns and pay tax on the income of the apartment properties requires no discussion. The properties in receivership consti-

tuted only a part of the property owned by the petitioner and such a receiver is under no obligation to file a return. Section 142(a), Internal Revenue Code; Reg. 111, 29.142-4; North American Oil Consolidated vs. Burnet, supra.

The petitioner's further contention, that the amounts paid to Ada are deductible by the petitioner under sections 22(k) and 23(u), is without merit. In order for the payments to be deductible this Court has said, in Charles L. Brown, 7 T.C. 715, 716:

The wife must be "divorced or legally separated from her husband under a decree of divorce or of separate maintenance." The payments in question must have been "received subsequent to such decree." And they must discharge an obligation "under such decree or under a written instrument incident to such divorce or separation." (Emphasis in each case added.) Even in the last quotation use of the word "such" to define "separation" demonstrates that what was meant was not any legal separation, as petitioner contends, but only one of a sort to which reference has already been made in the prior language, that is, a separation consummated "under a decree * * * of separate maintenance." See Frank J. Kalchthaler, 7 T.C. 625.

The payments before us were made pursuant to orders of the Florida court in a suit entitled a "Bill for Alimony Unconnected with Divorce." They were denominated as "temporary alimony and support" by the court in its orders. So far as we

can ascertain there never was entered in this litigation a "decree of separate maintenance" as required by section 22(k). We think such payments should receive the same treatment as payments of alimony pendente lite or payments made between the entry of an interlocutory decree and the time the decree became final. In neither case are such payments deductible. Joseph A. Fields, 14 T.C. 1202, affd. 189 F. 2d 950; Alice Humphreys Evans, 19 T.C... (No. 126). The Nevada divorce secured by the petitioner is of no significance on this issue. The payments were tied in with the Florida litigation alone and had no relation to the Nevada divorce which made no provision whatever for alimony or support. As a matter of fact the Florida courts resisted all of the petitioner's efforts to inject the Nevada divorce into the Florida proceedings.

Deductibility of Claimed Legal Expenses

The amount of legal fees claimed as a deduction is not too clear for 1946, but we think it is limited by the pleadings to $5,500. For 1947, $5,035 is claimed. The petitioner's contention with respect to these amounts is "that he is entitled to deduct the attorneys fees and legal expenses incurred in attempting to protect and recover possession of his business income producing properties." No sections of the Code are cited, nor are we referred to any cases by the petitioner and we do not know whether he relies on section 23(a)(1)A or section 23(a)(2). No matter, for we think the petitioner must fail under either.

Title to the properties was originally taken in the name of the petitioner's son, Kenneth, and when Ada began her suit for support she asked that a receiver be appointed to operate the apartments to insure the payment of any sums that might be found due her. She also asked the court to find that Kenneth held the properties in trust for the petitioner. Counsel were thereupon employed both for Kenneth and the petitioner in an attempt to sustain Kenneth's ownership of the apartments and the petitioner bore the entire cost of such representation. After the court found that Kenneth was holding the properties not for himself, but for the petitioner, the petitioner began an action in his own name in the federal courts. In that proceeding additional legal expenses were incurred.

With reference to the fees paid by the petitioner on behalf of Kenneth we do not perceive any theory which would justify their deduction by the petitioner. He was no more than a volunteer in that respect.

As to the petitioner's own legal expenses we think the principles of such cases as Lindsay C. Howard, 16 T.C. 157, affd. (C.A. 9, February 11, 1953) .. F.2d ..; Thorne Donnelley, 16 T.C. 1196; and Andrew Jergens, 17 T.C. 806 preclude their allowance as a deduction. All of those cases involved the deductibility of legal expenses arising out of disputes between husband and wife over property settlements or alimony payments. All held the expenses to be nondeductible. The genesis of the litigation here is just such a dispute as was involved in those

cases. There is one difference in the factual situation. Here, a receiver was appointed for part of the petitioner's properties as an incident of the litigation to insure payment of whatever might be found due to Ada from the petitioner for support, attorney fees, etc. We do not think that should change the result. The core of the litigation was not the receivership, but the obligation of the petitioner to support his wife. If that obligation was frustrated the receivership would fall. The legal expenses were incurred primarily to defeat the wife's suit and not to protect the petitioner's property. At one stage of the proceeding the petitioner was actually disclaiming ownership in favor of his son Kenneth.

In Thorne Donnelley, supra, a somewhat similar argument to that made here was advanced, though it is true that a sequestration of the petitioner's property was merely threatened there and not actually ordered. This Court said "that the contention that the expenditures for fees and costs represent the ordinary and necessary expenses of preserving and maintaining property held for the production of income because of resistance against enforcement of a personal obligation to pay alimony 'leaves us unmoved'." We hold that the petitioner is not entitled to deduct the claimed legal expenses and costs. He cites not a single case to support his contrary contention.

The petitioner claims, in the alternative, that the legal fees and expenses should be added to the cost of the Maxwell Court Apartments since they were expenditures made in defense of title, thus reduc-

ing his capital gain on the sale. The answer to this is that they were not such expenditures. Title to the property was never in dispute, except by the petitioner himself. As pointed out above, the expenses were primarily incurred in attempting to defeat Ada's claim for support.

Depreciation

In the notice of deficiency for 1946 the respondent disallowed a depreciation claim in the amount of $1,931.25 for the reason that the petitioner did not report any of the income from the property placed in receivership for that year. Since we have held that the petitioner was properly taxable on income from the receivership properties in 1946, we also hold that the claimed depreciation should have been allowed. We do not understand that the respondent contests this result.

The petitioner in his amended pleadings has increased this claim to $3,020. The record contains no evidence on which we could reasonably make any finding on this issue and the increased claim is disallowed.

Timeliness of 1947 Deficiency Notice

The petitioner filed his return for 1947 on Form 1040 prior to January 15, 1948, thus eliminating the necessity of a final declaration of estimated tax in accordance with the provisions of section 58(d)(3). Since the last day prescribed by law for filing this declaration was January 15, 1948, the petitioner contends that the period of limitation

with respect to the 1947 deficiency expired three years thereafter, or January 15, 1951. The notice of deficiency for 1947 was dated March 14, 1951. We cannot agree with the petitioner.

Section 53 requires returns to be filed on or before March 15 following the close of the calendar year. Under the conditions prescribed in section 58(d)(3), a return filed on or before January 15 shall be considered a declaration of estimated tax. Section 58(d)(3) does not require a return to be filed before January 15. It simply gives the taxpayer an option to file before that date and if he does, then the return is treated as a declaration or amended declaration of estimated tax. It is a convenience to the taxpayer and we do not think it has anything to do with starting the three-year limitation provided for in section 275. That period started on March 15, 1948, and the deficiency notice dated March 14, 1951, was timely. Harry B. Sidles, 19 T.C. .. (No. 128).

The petitioner raises one other point. He claims that he overpaid his 1945 taxes and asks the Court to take this into consideration in computing possible deficiencies in this case. But that is a matter properly for administrative settlement or adjustment between the parties. The year 1945 is not before us and and we make no determination on this point.

Decision will be entered under Rule 50.

Entered March 31, 1953.

[Endorsed]: T.C.U.S. Received March 26, 1953.

The Tax Court of the United States
Washington

Docket No. 29044

S. B. TRESSLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its memorandum Findings of Fact and Opinion entered March 31, 1953, the respondent having duly filed a proposed computation in accordance therewith and the petitioner having failed, after due notice, to file a counter proposed computation or to object at the hearing on September 9, 1953, to the computation as made by the respondent, it is hereby

Ordered and Decided: That there is a deficiency in income tax of $1,616.80 for the taxable year 1946.

[Seal] /s/ NORMAN O. TIETJENS,
Judge

Entered: September 17, 1953.

Served: September 18, 1953.

The Tax Court of the United States
Washington

Docket No. 35129

S. B. TRESSLER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion entered March 31, 1953, the respondent having duly filed a proposed computation in accordance therewith and the petitioner having failed, after due notice, to file a counter proposed computation or to object at the hearing on September 9, 1953, to the computation as made by the respondent, it is hereby

Ordered and Decided: That there is a deficiency in income tax of $2,049.68 for the taxable year 1947.

[Seal] /s/ NORMAN O. TIETJENS,
Judge.

Entered: September 17, 1953.

Served: September 17, 1953.

[Title of Tax Court and Causes 29044-35129.]

TRANSCRIPT OF PROCEEDINGS

Civil Court Record Courtroom, Sixth Floor, Dade County Court House, Miami, Florida, Wednesday, April 16, 1952, 2:00 p.m.

Before: Honorable N. O. Tietjens, Judge.

Appearances: J. A. Fitzsimmons, Esq., appearing for the Petitioner: Francis L. Van Haaften, Esq., (Honorable Mason B. Leming), Acting Chief Counsel, Bureau of Internal Revenue, appearing for the Respondent.

* * * * *

S. B. TRESSLER

the petitioner herein, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record, please.

The Witness: S. B. Tressler. I am claiming Reno, Nevada, as my address.

Direct Examination

Q. (By Mr. Fitzsimmons): Were you ever at any time a resident of the State of Florida, Mr. Tressler? A. No.

Q. In connection with your 1946 income tax return, the respondent has denied or disallowed your claim for attorney's fees made during that year. Did you at any time in 1946 pay any attor-

(Testimony of S. B. Tressler.)

ney's fees in connection with any litigation in the State of Florida?

A. I can't remember whether it was '46 or '47. I paid attorney's fees to W. T. George of Philippi, West Virginia.

Q. In what manner and what amounts were those payments made to Mr. George?

A. The first amount was paid, $200, that was paid in cash.

Q. Approximately when and under what circumstances was that payment made to W. T. George?

A. It was paid to him to come down here and check over the situation in regard to the litigation and the court's ruling on property that I bought for my son.

Q. What is your son's name?

A. Kenneth Tressler.

Q. Did you make any other payments to Mr. W. T. George in connection with that Florida litigation in which your son Kenneth Tressler was involved with you? A. $700.

Q. I hand you, Mr. Tressler, a check on the Security National Bank, bearing date of February 12, 1946, payable to W. T. George, in the amount of $700, bearing the maker's signature, S. B. Tressler, and ask you to examine that document and state whether or not that is a cancelled check for the payment of which you have just testified, to Mr. W. T. George? [Handing document to witness.]

A. Yes, sir, that is the check.

(Testimony of S. B. Tressler.)

Q. In what connection, or in what litigation was that payment made to Mr. George, if you recall?

A. I just don't understand your question, Mr. Fitzsimmons. It was made to come down here and try to protect my interests after the court had ruled that that property was mine. That is about the best answer I can make on it.

Q. Did Mr. George represent you in any litigation commenced in any court in the State of Florida?

A. Just what I have spoken of, to try to recover this property.

Q. Did you employ any other attorneys other than Mr. W. T. George in connection with litigation on your behalf in the State of Florida?

A. I think Mr. George did.

Q. Was that with your knowledge and approval? A. Yes, sir.

Mr. Fitzsimmons: At this time the petitioner offers in evidence check bearing date of February 12, 1946, payable to W. T. George, in the sum of $700 bearing cancellation stamps and endorsement thereon, as Petitioner's Exhibit No. 1 in evidence.

The Court: Any objection, Mr. Van Haaften?

Mr. Van Haaften: No objection.

The Court: It will be admitted.

The Clerk: Petitioner's Exhibit No. 1.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 1.)

Q. Mr. Tressler, in connection with the litiga-

(Testimony of S. B. Tressler.)

tion in which he was employed, was an appeal taken in that case to your knowledge?

A. To the best of my knowledge, there was.

Q. Was it necessary to print the record in that cause, do you know? A. It was.

Q. I hand you herewith printed transcript of the record in the United States Circuit Court of Appeals for the fifth circuit, wherein Shriver B. Tressler and Kenneth Tressler are named as appellant and cross-appellant, and Ada Zoeller Tressler and Ruth Westerberg as receiver, appellees. Was that litigation which Mr. George was employed in as your attorney?

A. That is.

Q. I hand you herewith, Mr. Tressler, check bearing date September 21, 1946, drawn on the Second National Bank of Uniontown, payable to W. T. George, in the sum of $525, signed by S. B. Tressler, and bearing a notation thereon "for printing record and costs in the Supreme Court appeal," bearing endorsement on the reverse side thereof of W. T. George, I ask you to examine that check and state whether or not that payment was made to Mr. W. T. George in connection with the appeal and the preparation of the transcript of record in the circuit court of appeals, fifth circuit?

A. It was.

Mr. Fitzsimmons: At this time the petitioner offers in evidence the cancelled check bearing date of September 21, 1946, drawn on the Second National Bank, payable to W. T. George in the sum of

(Testimony of S. B. Tressler.)

$525 bearing notation "for printing of records" I offer it as petitioner's Exhibit No. 2.

Mr. Van Haaften: No objection.

The Court: It will be admitted.

The Clerk: Petitioner's Exhibit No. 2.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 2.)

Mr. Fitzsimmons: At this time the petitioner offers in evidence the transcript of record, the printed copy of the transcript of record in the United States Circuit Court of Appeals for the fifth circuit, No. 11778, Shriver B. Tressler and Kenneth Tressler, appellant and cross-appellant respectively versus Ada Zoeller Tressler and Ruth Westerberg, as receiver appellees, the said transcript bearing the file stamp of the Clerk of the United States District Court, Oakley P. Dood, dated April 21, 1946.

Mr. Van Haaften: No objection.

The Court: Is the purpose to show the nature of the controversy?

Mr. Fitzsimmons: Yes, Your Honor, and that was the purpose of attempting to recover his property from the state courts.

The Clerk: Petitioner's Exhibit No. 3.

(The document referred to was received in evidence and marked Petitioner's Exhibit No. 3.)

Q. Mr. Tressler, I believe you previously testi-

(Testimony of S. B. Tressler.)

fied you were never a resident of the State of Florida? A. That's right.

Q. When and where were you and Ada Zoeller Tressler married?

A. Garret County, Maryland.

Q. When?

A. I believe it was—I thought it was August 19, but I believe somebody stated August 17, and I think August 17 is correct.

Q. Of what year? A. 1944.

Q. How long were you and Ada Zoeller Tressler married? A. About five months.

Q. After your marriage, where did you go to reside?

A. We started out honeymooning, if you would call it that—we went to Reno, Nevada, I had two boys there, and Ada's sister was trying to hook one of my sons, she wanted to go. Of course, she went with us.

Q. She went on your honeymoon?

A. All the time.

Q. How long did you stay in Nevada?

A. I can't recall that.

Q. Approximately.

A. Approximately thirty days.

Q. Then where did you go?

A. We went on through California.

Q. Where did you go to sojourn for the winter of 1944-1945?

A. We arrived over in St. Petersburg, I believe it was in November, maybe December.

(Testimony of S. B. Tressler.)

Q. Can you refresh your recollection on that?

A. No, I can't.

Q. When you came to the State of Florida, did you come with any intention of making Florida your home?

A. I didn't have no intentions, we were just out honeymooning. We stayed in St. Petersburg for, I believe, thirty-two days.

Q. Then where did you go?

A. Then we come over on the east coast.

Q. After you arrived on the east coast, where did you stay?

A. It was called the Venetian Apartments, Fort Lauderdale.

Q. Did you rent it or purchase it, or rent it for a year, or for a long term or for a short term?

A. I rented it for a month.

Q. Did you, during your sojourn in Fort Lauderdale, Florida, purchase any property in Fort Lauderdale? A. Yes, sir.

Q. Describe the property or properties, if any, you purchased, and approximately when?

A. I first purchased the Maxwell Court Apartments.

Q. For whom, if anyone, did you purchase the Maxwell Court Apartments?

A. My youngest son—not youngest son, my son Kenneth.

Q. For what purpose, Mr. Tressler?

A. So he would have an income. He blacked out during maneuvers in the army, he was in the hos-

(Testimony of S. B. Tressler.)

pital for a long time and was medically discharged, and he wasn't capable, I didn't think, of going along and making a living.

Q. Did your wife, Ada Tressler, know of this purchase for your son?

A. She did, and agreed with it very much because Kenneth and her sister was going to be married.

Q. What other property, if any, did you purchase in Fort Lauderdale during your sojourn there?

A. I purchased six lots on No. 1 highway. I purchased two lots, I believe they were on 19th Street, I'm not sure.

Q. In whose names were those lots purchased?

A. In Kenneth's name.

Q. Did Mrs. Ada Zoeller Tressler know of the purchase of those vacant lots?

A. She did, and I purchased one lot on an island. That was in her and my name jointly, we were going to build a home there to live in.

Q. When?

A. Well, just as soon as we got straightened up.

Q. Was that during the war? A. Yes.

Q. Was it possible to build homes at that time?

A. Well, yes and no, they were being built and they were being rejected.

Q. What other properties, if any, were purchased by you?

A. Tarpon River Apartments.

Q. From whom was that purchased?

(Testimony of S. B. Tressler.)

A. Mrs. Westerberg.

Q. Did Ada Zoeller Tressler know of the purchase of the Tarpon River Apartments from Mrs. Westerberg? A. Yes, sir.

Q. In whose name was the purchase of the Tarpon River Apartments made?

A. In Kenneth's name.

Q. Did Mrs. Ada Tressler know that that apartment was taken in his name?

A. Yes, sir, she was with me.

Q. Now, Mr. Tressler, would you state please the cost of the Maxwell Court Apartments and what it consisted of?

A. It consisted of eight units; to the best of my knowledge it was $45,000.

Q. From whom was it purchased?

A. Through a real estate man from people by the name of Maxwell.

Q. Was the property furnished or unfurnished?

A. Furnished.

Q. What was the value of the furniture, if you know, at the time you purchased it, approximately?

A. I would say about $6,000.

Q. What was the value of the land upon which the buildings were located?

A. Lots in that district—I got a price on a lot right adjoining—to the best of my knowledge it was $1200.

Q. How many lots were involved in the land area purchased with the Maxwell Apartments?

A. Three.

(Testimony of S. B. Tressler.)

Q. With regard to the Tarpon River Apartments, what was the purchase price of that property? A. I think it was $22,875.

Q. Was that property furnished?

A. Yes, sir.

Q. Was it purchased furnished?

A. Yes, sir.

Q. What was the value of the furniture in the building of the Tarpon River Apartments?

A. Well, it was furnished pretty nice. I would say $5,000.

Q. What was the value of the land upon which the building was constructed or that were acquired in that purchase?

A. It was in a much better district, $2200.

Q. How many lots were there in the Tarpon River purchase?

A. I think it was only one.

Q. How many units, rental units, were there in the Tarpon River Apartments? A. Four.

Q. After arrangements were made for the purchase of these properties—strike that. Would you say, please, Mr. Tressler, the cost of the six lots that you testified you purchased on Federal Highway? A. $14,000.

Q. What was the cost of the two lots that were purchased by you, you mentioned? A. $1300.

Q. What was the cost of the lot on the island that you purchased, the lot on the island?

A. $4500.

(Testimony of S. B. Tressler.)

Q. Was that the lot you testified was taken in the names of yourself and Ada Tressler jointly?

A. That's right.

Q. Of what state were you a resident at the time of your marriage to Ada Zoeller Tressler?

A. My last place I registered and voted was West Virginia.

Q. Was that in 1944?

A. No, I believe it was 1942.

Q. Were you engaged for several years in any business in the State of West Virginia immediately prior to your marriage to Ada Zoeller Tressler? A. Coal business.

Q. How long were you engaged in that business in West Virginia prior to your marriage to Ada Zoeller Tressler? A. Eleven years.

* * * * *

Mr. Fitzsimmons: At this time petitioner asks leave to have the Court note as petitioner's Exhibit No. 9 statute No. 65.10 of the Florida Statutes Annotated, titled "Alimony unconnected with causes of divorce" and the substance of such statute appearing in volume 5 of the Florida Statutes Annotated, by West Publishing Company at page 612 and at page 613 of the Florida Statutes Annotated—we offer that as petitioner's Exhibit No. 9.

Mr. Van Haaften: Your Honor——

The Court: I think I am entitled to take judicial notice of this.

Mr. Van Haaften: If your Honor please, I was going to suggest, I understand the Tax Court takes

judicial notice of all the statutes of the several states in which they operate.

The Court: That is my understanding.

Mr. Van Haaften: In addition to this, you will take judicial notice of any other statutes in this state that might be pertinent.

The Court: If drawn to my attention by counsel.

* * * * *

[Endorsed]: T.C.U.S. Filed June 10, 1952.

PETITIONER'S EXHIBIT No. 9

In the Circuit Court of the Fifteenth Judicial Circuit in and for Broward County, Florida

In Chancery No. 10760

ADA A. TRESSLER, Plaintiff,

vs.

SHRIVER B. TRESSLER, et al., Defendants.

ORDER

This cause came on to be heard upon the Plaintiff's motion for the entry of an order in favor of Plaintiff, Ada A. Tressler, for temporary alimony and support, costs and attorney's fees, quasi in rem, against the Defendant, Shriver B. Tressler, and all of the property set out and described in Plaintiff's bill of complaint, and the amendments thereto, and the returns and profits therefrom, situate and located in Broward County, Florida,

Petitioner's Exhibit No. 9—(Continued)

and within the jurisdiction of this court, subject to any right, title or interest of Defendant, Kenneth Tressler, that may be had in and to said property, or any part thereof, or may be decreed by this court, and the court being fully advised in the premises, it is,

Ordered, Adjudged, and Decreed as follows:

1.

That this is a suit by Plaintiff, Ada A. Tressler, against the Defendant, Shriver B. Tressler, for alimony, support, costs and attorney's fees, and is a suit in rem as to all of the property set out and described in Plaintiff's bill of complaint and the amendments thereto, including the rents and profits therefrom, located in Broward County, Florida;

2.

That this court has jurisdiction of the subject matter of this suit and the property set out and described in Plaintiff's bill of complaint and the amendments thereto, including the rents and profits therefrom located in Broward County, Florida;

3.

That the Defendant, Shriver B. Tressler, has been duly and regularly served with process by publication, and a decree pro confesso duly and regularly rendered against him on the 5th day of June A. D. 1945, which said decree pro confesso is here ratified and confirmed by this Court; that the plaintiff, Ada A. Tressler, is the wife of the de-

Petitioner's Exhibit No. 9—(Continued)

fendant, Shriver B. Tressler, and is entitled to alimony, support, costs and attorney's fees, and temporary alimony and support, costs and attorney's fees, are here fixed by this Court in the following amounts, to-wit:

(a) The sum of Three Hundred ($300.00) Dollars per month from March 3, 1945.

(b) All the costs of this cause to this date, consisting of the following items, to-wit:

To: Ted Cabot, Clerk of this Court, paid by Davis & Lockhart	$ 16.00
To: W. R. Clark, Sheriff of Broward County, paid by Davis & Lockhart	12.10
To: J. W. Coleman, Court Reporter, paid by Davis & Lockhart	143.45
To: Ft. Lauderdale Daily News, for advertising, paid by Davis & Lockhart	26.36
Certified copies of divorce proceedings, Shriver B. Tressler vs. Ada A. Tressler, paid by Davis & Lockhart	10.00
To: William C. Howard, Clerk of the U. S. District Court, copies of proceedings United States vs. Shriver B. Tressler, paid by Davis & Lockhart	1.40
For Intangible tax, $82.00; State tax, $41.00, recording fee, $2.55, paid by Davis & Lockhart for recording Mortgage Deed securing note of $41,000.00	125.55
Total amount paid by Davis & Lockhart, to date	$ 334.86

(c) The sum of $2,000.00 as temporary attorney's fees to enable plaintiff to compensate her attorneys herein, Davis & Lockhart, and her obligation to associate counsel incurred by the said Davis & Lockhart by plaintiff's consent on behalf of plaintiff and that all of said foregoing amounts are here

Petitioner's Exhibit No. 9—(Continued)

decreed to be a lien upon all the right, title and interest of Defendant, Shriver B. Tressler, if any, in and to the property set out and described in Plaintiff's bill of complaint and the amendments thereto, and the rents and profits derived therefrom, to which bill and amendments, reference is here had for description, located in Broward County, Florida, subject to any right, title or interest of Defendant, Kenneth Tressler, if any, that may be hereafter shown to exist, or decreed by this court, and jurisdiction is here retained by this court for the purpose of enforcing said lien and the collection of the amount of temporary alimony and support, costs and attorney's fees, herein adjudged and allowed until after the adjudication by this court of the status of ownership, legal and beneficial, of all the property in Broward County, Florida, set out and described in Plaintiff's bill of complaint and the amendments thereto, including the $41,000.00 note executed by Kenneth Tressler to the Defendant, Shriver B. Tressler, and the mortgage deed to secure same;

4.

The receiver, Ruth Westerberg, is hereby directed to take charge of all of the property in Broward County, Florida, described in Plaintiff's bill of complaint and the amendments thereto, including the note dated January 29, 1945 in the sum of $41,000.00, executed by Defendant, Kenneth Tressler, payable to the order of Shriver B. Tressler and secured by mortgage deed on Lots 1, 2, 3 of

Petitioner's Exhibit No. 9—(Continued)

Block 30, North Lauderdale, as recorded in plat book 1 at page 182 of the Dade County, Florida public records, and the clerk of this court is hereby directed to deliver said note and mortgage deed to the receiver herein, Ruth Westerberg, and said receiver will keep and retain said note and mortgage deed in her possession, as well as all of the other property in Broward County, Florida set out and described in Plaintiff's bill of complaint and the amendments thereto until the further order of this court, and will collect the interest on said $41,000.00 note when due and payable and deposit same to her credit as receiver, to be held until further order of this court, and said Shriver B. Tressler is hereby enjoined from collecting said note, or any part thereof, or the interest thereon, and the said Defendant, Kenneth Tressler, is hereby enjoined from paying said note or any part thereof, or the interest thereon, to the Defendant, Shriver B. Tressler, or any other person except Ruth Westerberg, the receiver herein, or as may be hereinafter directed by this court;

5.

The receiver herein will continue to collect the rents from the property in her hands as such receiver and pay the necessary bills and expenses as heretofore directed by this court, and

6.

Jurisdiction of all other questions, matters and

Petitioner's Exhibit No. 9—(Continued)

things involved in this suit not herein specifically decreed, are hereby retained by this court.

Done and Ordered at Ft. Lauderdale, Broward County, Florida, on the 28th day of June A.D. 1945.

/s/ GEORGE W. TEDDER,
Judge

State of Florida, Broward County: This instrument filed for record 29th day of June, 1945, and recorded Chancery Order Book 124, page 280. Record verified. [Seal] Ted Cabot, Clerk; signed by Zenda Alexander, D. C.

Certification attached.

Admitted in Evidence April 16, 1952.

[Title of Tax Court and Causes 29044 and 35129.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached proposed computations are submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the

decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

Said computations provide that there are deficiencies in income tax for the taxable years ended December 31, 1946 and December 31, 1947, in the amounts of $1,616.80 and $2,049.68, respectively.

/s/ KENNETH W. GEMMILL,
Acting Chief Counsel, Internal Revenue Service

Of Counsel:

William H. Loeb, Regional Counsel
F. L. Van Haaften, Acting Appellate Counsel
D. Z. Cauble, Jr., Special Attorney, Internal Revenue Service.

Computation for Entry of Decision

ARC-Ap:ATL—Atl:MDE:LTB

In re: S. B. Tressler, c/o General Delivery, Reno, Nevada.
Docket No. 29044.

Tax Liability for the Year Ended Dec. 31, 1946
Income Tax

Year	Correct Liability	Liability Per Return	Deficiency
1946	$1,854.80	$238.00	$1,616.80

A recomputation of petitioner's income tax liability for the year ended December 31, 1946 has been prepared in accordance with the Memorandum Opinion of The Tax Court of the United States entered March 31, 1953.

Net Income

Net income as shown in statutory notice of deficiency dated March 14, 1950 ..... $ 7,571.13

Addition: (a) Rental income	5,334.86
Total	$12,905.99
Deduction: (b) Depreciation allowed	1,931.25
Net income as adjusted	$10,974.74

Explanation of Adjustments

(a) The Tax Court of the United States in its Memorandum Opinion has held that the following amounts, totaling $5,334.86, paid in 1946 by the receiver of apartment properties under court order from the rental receipts thereof represent taxable income to the petitioner, and adjustment is made herein to increase petitioner's net income by said amounts.

Accrued temporary alimony to Ada Tressler	$3,000.00
Attorney fees for Ada Tressler	2,000.00
Court costs	334.86
Total	$5,334.86

(b) The Tax Court has held that inasmuch as the petitioner was properly taxable on income from the receivership properties in 1946, the depreciation claimed by the petitioner on this property should be allowed. Therefore, depreciation claimed on the return in the amount of $1,931.25 which was disallowed in the notice of deficiency has been allowed and income decreased accordingly.

Computation of Tax

Net income as adjusted	$10,974.74
Less: Exemptions	3,000.00
Income subject to normal tax and surtax	$ 7,974.74
Tentative normal tax and surtax on $7,974.74	$ 1,952.42
Less: 5% of $1,952.42	97.62
Correct income tax liability	$ 1,854.80
Income tax liability disclosed by return	238.00
Deficiency in income tax	$ 1,616.80

Note: The overpayment of $335.25 for the year 1945 has been allowed by the District Director of Internal Revenue for the Dis-

trict of Nevada as a credit against the 1946 and 1947 tax liabilities, as follows:

Portion of overpayment allowed in 1946	$238.00
Portion of overpayment allowed in 1947	97.25
Total credit allowed	$335.25

Computation for Entry of Decision

ARC-Ap:ATL—Atl:MDE:LTB

In re: S. B. Tressler, c/o General Delivery, Reno, Nevada.
Docket No. 35129

Tax Liability for the Year Ended Dec. 31, 1947

Income Tax

Year	Correct Liability	Liability Per Return	Deficiency
1947	$3,465.01	$1,415.33	$2,049.68

A recomputation of petitioner's income tax liability for the year ended December 31, 1947 has been prepared in accordance with the Memorandum Opinion of The Tax Court of the United States entered March 31, 1953.

Net Income

Net income as shown in statutory notice of deficiency dated March 13, 1951		$12,515.86
Additions:		
(a) Rental income	$1,177.69	
(b) Long-term capital gain increased	1,881.76	3,059.45
Net income as adjusted		$15,575.31

Explanation of Adjustments

(a) The Tax Court of the United States has held that the following amounts, totaling $1,177.69, paid in 1947 by the receiver of apartment properties under court order from the rental receipts thereof represent taxable income to the petitioner and adjustment is made herein to increase petitioner's net income by said amounts.

Temporary alimony paid to Ada Tressler	$ 984.69
Court costs	193.00
Total	$1,177.69

(b) The capital gain on sale of the Maxwell Court Apartments has been increased in the amount of $1,881.76 in accordance with the Memorandum Opinion of the Tax Court, computed as follows:

Selling price of Maxwell Court Apartments		$59,000.00
Less: Expense of sale		3,156.35
Net selling price		$55,843.65
Cost of Maxwell Court Apartments in 1945	$45,000.00	
Less depreciation allowed thereon:		
Year 1946	$1,246.00	
Year 1947	830.00	2,076.00
Adjusted cost basis		42,924.00
Profit on sale		$12,919.65
Long-term capital gain—taxable 50 percent		$ 6,459.83
Long-term capital gain from sale of Maxwell Court Apartments shown in statutory notice of deficiency		4,578.07
Long-term capital gain increased		$ 1,881.76

Computation of Tax

Net income as adjusted	$15,575.31
Less: Exemptions	3,000.00
Income subject to normal tax and surtax	$12,575.31
Tentative normal tax and surtax on $12,575.31	$ 3,647.38
Less: 5% of $3,647.38	182.37
Correct income tax liability	$ 3,465.01
Income tax liability disclosed by return	1,415.33
Deficiency in income tax	$ 2,049.68

[Endorsed]: T.C.U.S. Filed August 11, 1953.

[Title of Tax Court and Causes 29044 and 35129.]

MOTION FOR RECONSIDERATION

Comes now the petitioner S. B. Tressler by his undersigned attorney and moves the Court to reconsider the Memorandum Findings of Fact and Opinion entered in the above consolidated causes dated March 31, 1953 and served upon counsel for petitioner on April 3, 1953, and for grounds of this motion says:

That petitioner believes that this Court in said opinion overlooked or failed to consider the following:

1. Full faith and credit was not accorded the Final Decree of divorce granted petitioner dated July 17, 1945 by the Second Judicial District Court of the State of Nevada dissolving the bonds of matrimony with Ada Z. Tressler.

2. That the temporary residence of the parties "to spend the winter in Florida" did not vest the State of Florida as the marital domicil of the parties, and in the absence of a direct attack upon said Final Decree of divorce though obtained upon constructive service of process, the Florida Courts and this Court must accord it Full Faith and Credit.

3. That the form of action commenced by Ada Tressler in March, 1945 although entitled "Bill for Alimony unconnected with divorce" was held by the Florida Court to be an action for support com-

menced and maintainable under Section 65.10 Fla. Stat. 1941 (See Petitioner's Exhibit No. 8).

4. That upon entry of the Final Decree of divorce in Nevada on July 17, 1945 the marital relationship ceased to exist also the duty to support the former wife likewise ceased, since no final decree of separation had theretofore been entered by the Florida court, only an interlocutory order had been entered and no personal service had been obtained upon the petitioner S. B. Tressler in the Florida proceeding and he did not at any time submit himself to the jurisdiction of the Florida court. (See Petitioner's Exhibit No. 3.)

5. That although the order of the Florida court allowing temporary support, costs and temporary attorney's fees was dated June 13, 1945 prior to the Final Decree of divorce entered July 17, 1945, the actual payment was by order dated January 7, 1946 entered subsequent to Final decree of divorce, consequently said payment to the former wife was actually made under order or decree of court and at a time when said Ada Tressler was not the wife of petitioner, consequently such payment was income to Ada Tressler and taxable to her and not to petitioner.

6. Upon entry of the Final Decree of divorce on July 17, 1945 by the Nevada Court after publication and mailing of notice to Ada Tressler, the right of the Florida court to order support paid to Ada Tressler as the wife of S. B. Tressler ceased.

7. After entry of the Final Decree of divorce by the Nevada Court based upon constructive service

of process, the marriage relationship was terminated July 17, 1945 and thereafter Ada Tressler in the absence of a direct attack upon said divorce decree was limited to an action for the allowance of permanent alimony under Section 65.08 Fla. Stat. 1941, and any such action for the imposition of a Final Decree awarding alimony against S. B. Tressler her former husband to be enforceable against him, would have to be entered in an action where personal service of process was first had and obtained. No such character of jurisdiction was ever held by the Florida court over S. B. Tressler, the award of temporary alimony entered after entry of the final decree of divorce was invalid. Upon being apprised of the entry of the final decree of divorce the Florida court should have terminated the action of Ada Tressler for support, and she be required to attack the validity of the Nevada divorce decree in the proper forum, or commence a separate action against her former husband to adjudicate her rights to permanent alimony, if any.

Gaylord vs. Gaylord, .. Fla. .., 45 So. 2d. 507, 509-510,

Pawley vs. Pawley, .. Fla. .., 46 So. 2d. 464, 474-475,

Standish vs. Standish, 40 N.Y.S. 2d. 538, 179 Misc. 564.

8. That any and all payments of "temporary alimony" suit money and attorneys fees made to Ada Tressler in 1946 and 1947 were made under Order or decree of court entered after termination of marriage and in legal effect constituted income

to her from her former husband, taxable to her and not to petitioner.

9. The case at bar is distinguishable from Estin vs. Estin, (1948) 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; Kreiger vs. Kreiger, (1948) 334 U.S. 555, 68 S.Ct. 1221, 92 L.Ed. 1572; and Rice vs. Rice, (1949) 336 U.S. 674, 69 S.Ct. 751, 93 L.Ed. 958; in that in each of the cited cases final decrees of separation from bed and board and permanent alimony awards had been made. In the instant case only an action for support was pending when the Nevada final decree of divorce was entered. The provisions of the interlocutory order of June 13, 1945 were only enforceable, if at all, up to July 17, 1945 when the final decree of divorce was entered and which decree remains unimpeached.

10. That the refusal of the Florida court to allow Kenneth Tressler after entry of decree pro confesso, to plead the Nevada decree granted S. B. Tressler did not void or nullify the legal effect of said divorce decree when relied upon by S. B. Tressler. Its ground, extreme cruelty meets Florida law.

11. The refusal of the United States District Court to allow the relief sought by S. B. Tressler to rest his property from the State court and its Receiver did not adjudicate or hold invalid the Nevada divorce decree, and said District Court's Order dismissing said Bill of Complaint was appealed as error. (Pet. Exh. No. 3).

12. The petitioner's 1946 and 1947 income tax returns show that he remarried and claimed Pearl Ann Tressler as his wife and a dependent. The

rights of third parties having intervened and no direct attack having been made upon said Final Decree, this Court under Article 4, Section of the United States Constitution is required to give said decree Full Faith and Credit.

See Pawley vs. Pawley, .. Fla. .., 46 S.2d. 464, 468-469.

13. Whatever the right of the Courts of a Sovereign State to weigh and consider the bonafides of the final divorce decree of a Sister State affecting the marital status of persons domiciled therein, petitioner respectfully submits that this Court, in the absence of a decree of a State or District Court invalidating the divorce, must accord to all such decrees Full Faith and Credit unless shown to be void upon the face of such divorce decree, therefore the Petitioners decree of divorce from Ada Tressler obtained in Nevada on July 17, 1945 terminated his marriage and also his duty to support her, any payments thereafter made to her under Court order or decree were taxable to her as income, and not taxable to petitioner.

14. In disallowing the attorneys fees paid by S. B. Tressler in the Florida litigation wherein his income producing properties were sequestrated, petitioner respectfully submits that this Court has overlooked or failed to consider that petitioner was held to be the owner thereof and Kenneth Tressler who endeavored to protect said properties was held to be petitioner's Trustee, consequently petitioner was in fact the real party in interest and such payments of attorneys fees were made upon petition-

er's behalf, and the bulk of such fees were earned after entry of the Nevada divorce decree and termination of the marriage and duty to provide support for his former wife Ada Tressler. Said fees were necessary in attempting to recover possession of said income producing properties and the income therefrom. Said expenses were incurred and should be allowed as a business expense. The petitioner did not claim any deduction for attorneys fees in obtaining his divorce, only to recover his income producing property.

15. That this Court overlooked or failed to consider that in the Florida proceedings the title to the Maxwell Court and Tarpon River Apartment properties were involved, the Courts decree dated January 7, 1946 divested Kenneth Tressler of title and impressed a trust thereon, the legal effect of which was to hold that petitioner because he purchased the property held title. In the event attorneys fees are not allowed as a direct business expense in recovering or attempting to recover the petitioner's income producing properties, certainly such fees should be allowed to be added to the total cost of said income producing properties, since said litigation did involve title.

16. In regard to the disallowance of the increased claim for deficiency for the year 1946 totalling $3,020.00 petitioner believes that this Court failed to consider that the evidence showed that the cost of the Buildings and furnishings of the Tarpon River Apartments was $15,675.00 and $5,000.00 respectively, and those the Maxwell Apartments were

$35,400.00 and $6,000.00 respectively. Only 1,931.25 was claimed as deficiency for 1946. Applying the proper rates of depreciation against the furniture in rental units viz: 15% of $11,000 the furniture alone was depreciable at the rate of $1,650.00 per year. The buildings totalling $51,075.00 depreciated over $1500.00 per year. It is submitted that the claimed depreciation of $3,020.00 as amended should be allowed. (See pages 2 and 3 of Findings of Fact and Opinion.)

17. That this Court overlooked or failed to consider that payments of alimony made after entry of final decree of divorce to the wife are taxable to her as income. Sec. 29.22 (k). Likewise payments made to her from a trust. An involuntary trust was created by the Florida court's receivership over petitioners property solely for the purpose of making payments to Ada Tressler and her attorneys. Said payments were made to the former wife Ada Tressler under Order or Decree dated January 7, 1946 long after the marriage had been terminated by Final decree of divorce. Since the marriage had been terminated, the payments made were not merely "interlocutory" but came long after entry of the Final Decree of divorce. Such payments were income to the former wife and deductible by the payee, since they were made by court order entered subsequent to final decree of divorce.

18. In the years 1946 and 1947 the petitioner was not under any obligation to provide support Ada Tressler as the wife of the petitioner, the final decree of divorce having been obtained on July 17,

1945. (Petitioners Exhibit No. 4.) All payments actually made by the Florida court to Ada Tressler out of the involuntary trust fund created by sequestering petitioners income producing properties, were made after the divorce and by order or decree of court. Such payments under Section 29.22 (k) are deductible by the former husband and taxable to the former wife.

For the reasons herein set forth petitioner respectfully moves the Court to grant this motion for reconsideration, and moves the Court to reconsider the Findings of Fact and Opinion heretofore entered herein.

/s/ JOSEPH A. FITZSIMMONS,
Attorney for Petitioner

[Endorsed]: T.C.U.S. Lodged May 5, 1953.

[Endorsed]: T.C.U.S. Denied May 6, 1953.

[Title of Tax Court and Cause No. 29044.]

MOTION TO VACATE OR REVISE DECISION

Comes now the Petitioner, S. B. Tressler, by his undersigned attorney, and respectfully moves The Tax Court of the United States to vacate or revise the Decision entered in the above styled cause on September 17, 1953 and assessing against the Petitioner a deficiency in income tax for the taxable year 1946 in amount of $1,616.80, and for grounds hereof petitioner shows unto The Tax Court of the United States, as follows:

1. That said deficiency was predicated upon the sum of $5,334.86 charged to petitioner as income for 1946, and paid under Order of the Circuit Court of Broward County, Florida through its Receiver, Ruth Westerberg, to Ada A. Tressler, the former wife of petitioner, and petitioner shows unto the Court that on January 7, 1946 when said Order was entered, he was not the husband of Ada A. Tressler, having been divorced from her by Final Decree of Divorce dated July 17, 1945 entered by the Second Judicial District Court of the State of Nevada. (Petitioner's Exhibit No. 4) and this Honorable Court has failed to accord Full Faith and Credit thereto, and petitioner respectfully shows unto the Court, that under Section 29.22 (k)-1 of the Income Tax Regulations, all payments made under an Order of Court, after a Final Decree of Divorce, to a former wife, are income to the former wife and taxable to her, and not to her former spouse; therefore the Decision entered entered herein should be vacated.

2. The Tax Court failed to consider that the petitioner S. B. Tressler had not ever been personally served with process or appeared in the Florida action commenced by Ada Tressler for separate maintenance under Section 65.10 Florida Statutes, 1941. (Petitioner's Exhibit No. 8, and No. 9) and consequently upon entry of the Final Decree of Divorce on July 17, 1945 by the Nevada Court, the obligation to support his former wife terminated. (Herrick vs. Herrick, 55 Nev. 59, 68, 25 P2d. 378, 380).

3. The Tax Court overlooked or failed to consider that only an order for temporary support or as misstated as "temporary alimony" had been entered in the Florida action brought by Ada Tressler and said Florida Court had not prior to July 17, 1945 when the Final Decree of divorce was granted to petitioner, entered any final decree whatsoever, and the divorce action having been concluded first, the duty and obligation to support ceased. (Herrick vs. Herrick, supra.)

4. The final decree of divorce entered on July 17, 1945 by the Nevada Court, although based upon constructive service by publication of the said Ada Tressler, nevertheless, was valid and terminated the marriage relationship. Estin vs. Estin (1948) 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; Stewart vs. Stewart, (1934) 115 Fla. 158, 155 So. 114, 115). Subsequent to the entry of the Final Decree of divorce on July 17, 1945, the Florida Court was without power to enter an order for temporary alimony, without first having determined the legality of the Nevada decree, after appropriate pleadings had been filed and proof taken. The Florida Court has at no time held the Final Decree dated July 17, 1945 entered by the Nevada Court in favor of the petitioner to be void, and the same stands unimpeached.

5. The Tax Court failed to consider that the petitioner S. B. Tressler was not a citizen of or domiciled in the State of Florida, and this Court held that he went to Florida only to spend the winter in 1945. (Memo. Opinion, Findings of Fact,

page 2.) The Florida Court did not have jurisdiction of the person of S. B. Tressler, and the parties to the marriage not having resided in Florida for ninety (90) days prior to suit commenced by Ada Tressler, the Florida Court did not have jurisdiction to grant a divorce or alimony unconnected with divorce. (Sec. 65.02 Florida Statutes, 1941). The parties were not bona fide residents of Florida, merely sojourning as tourists spending the winter in Florida.

6. Petitioner reaffirms all grounds of his Motion for Reconsideration filed herein on May 5, 1953 and Denied on May 6, 1953 and to which reference is prayed as though set forth herein and made a part hereof.

7. Petitioner having relied upon the Final Decree of divorce which he obtained in Nevada on July 17, 1945, remarried in Nevada and upon his 1946 income tax return claimed his wife, Pearl Ann Tressler, nee Pearl Ann Mounce, as a dependent, together with his step-children. The Respondent allowed these exemptions, yet seeks to charge petitioner with temporary alimony payments made to another 'wife' Ada Tressler. In 1946 Ada Tressler was his former wife, and petitioner was not under any valid legal or moral obligation to support his former wife Ada Zoeller Tressler.

8. In 1948 by the decision of Estin vs. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561, the doctrine of divisible divorce was sanctioned and the right of a State to enforce a prior final decree of separation coupled with payments of support, was upheld.

The law as it existed in 1946 and 1945 between the parties hereto was as stated in, Thompson vs. Thompson, (1913) 226 U.S. 551, 33 S.Ct. 129, 57 L.Ed. 347; Atkins vs. Atkins, (1944) 386 Ill. 345, 54 N.E.2d 488; Herrick vs. Herrick, 55 Nev. 59, 68, 25 P.2d 378, 380; and Stewart vs. Stewart, (1934) 115 Fla. 158, 155 So. 114, 115. Upon entry of a final decree of divorce, even based upon constructive service of process, it is entitled to full faith and credit, but can be attacked but so long as it remains unchallenged, said final decree constitutes a complete and perfect bar to the former wife's action for alimony. In 1950 Florida by the case of Pawley vs. Pawley, ... Fla. ..., 46 So.2d 464, 28 ALR 1358, cert. denied 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632, adopted the status of divisible divorce, and recognized the right of a wife who had been served by constructive process, to re-litigate the matter of property rights subsequent to entry of the divorce decree obtained in a foreign jurisdiction. The plaintiff wife was denied the right to maintain an action for alimony unconnected with divorce, where it appeared the husband had already obtained a valid decree of divorce upon the ground of desertion, but based on constructive service of process. The petitioner's divorce was upon the same ground and based on constructive service. Petitioner submits that all payments made to Ada Tressler after his divorce from her, were taxable to Ada Tressler and not to petitioner.

9. Petitioner respectfully shows unto the Tax Court that under the Order dated January 7, 1946

(Resp. Exh. "E") the property known as the Maxwell Court and Tarpon River Apartments was decreed to be held in trust by Kenneth Tressler. Since the property was held in trust and for the benefit of the former wife, Ada Tressler, then under Section 29.22 (k)-1, Internal Revenue Income Tax Regulations the periodic payments received by a former wife attributable to income producing property held in trust for her benefit are taxable to the former wife.

10. Petitioner respectfully submits that the expenditure by him of $5,500.00 subsequent to obtaining his divorce in an effort to recover possession of his income producing properties, Maxwell Court and Tarpon River Apartments, was not expended in either a divorce or alimony action, but was made necessary by the action of the Florida Court in refusing to release this property from Receivership, although the purpose of its impounding was solely to provide support to Ada Tressler. The expenditure of said attorneys fees should be allowed to petitioner as a business expense in protecting his business property.

11. The decision as entered failed to allow petitioner depreciation in the sum of $3,020.00 as claimed. Only the sum of $1,931.25 was allowed. The evidence shows that the rental properties were furnished. The Maxwell Court furniture cost $6,000 and the Tarpon $5,000 making $11,000 in furniture alone, which depreciates at the rate of 15% per annum or $1,650.00. The buildings were valued at 35,400.00 and 15,675 respectively, for a total of

$51,075.00 and depreciated at the rate of 3% per annum or $1,532.25 making a total depreciation for 1946 of $3,182.25. By amended pleadings $3,020.00 was claimed. Petitioner respectfully submits the correct amount of depreciation should be allowed the petitioner, and the decision entered herein be vacated or revised.

12. The petitioner did not receive one cent of the revenue that the Receiver, Ruth Westerberg collected as rents from the two apartment buildings from March, 1945 to March 1947, and to charge him with income and tax him thereon, is contrary to all human understanding and cries out for relief. He was saddled with vexatious litigation which was costly to him, and brought about by a wife whom he has proven to the satisfaction of the Nevada Court had deserted him. They were married in August and separated the following March. He was required to expend his money for attorneys' fees to protect his property from being dissipated unlawfully. These expenses should have been allowed. He did not charge any attorneys' fees for obtaining his divorce, only to recover his property.

Wherefore, petitioner respectfully moves the Tax Court of the United States to vacate and set aside, or revise the Decision entered herein September 17, 1953. And your petitioner will ever pray.

/s/ JOSEPH A. FITZSIMMONS,
Attorney for Petitioner S. B. Tressler.

[Endorsed]: T.C.U.S. Filed October 19, 1953.

[Title of Tax Court and Cause No. 35129.]

MOTION TO VACATE OR REVISE DECISION

Comes now the Petitioner, S. B. Tressler, by his undersigned attorney, and respectfully moves The Tax Court of the United States to vacate or revise the Decision entered in the above styled cause on September 17, 1953, assessing against the petitioner a deficiency in income tax for the taxable year 1947, in amount of $2,049.68, and for grounds hereof petitioner shows unto the Court:

1. This cause was tried as a companion case with Docket No. 29044 and a similar Motion to Vacate or revise the Decision rendered in said cause has been filed, and said Motion and the grounds therein set forth, are by reference made a part of this Motion as though set forth herein in extenso, and said Motion to Vacate is respectfully referred to, and requested to be considered in this cause.

2. The payment of $984.69 to Ada Tressler as temporary alimony and $193.00 as court costs, under the Final Decree dated July 16, 1947, and entered two years after the petitioner was divorced from Ada A. Tressler, should not be taxed against the petitioner, but to Ada A. Tressler, as payment of alimony or support under Court Order rendered subsequent to entry of the divorce decree. (Sec. 29.22 (k)-1, Income tax regulations.)

3. The sum of $6,535.00 proven to have been spent by S. B. Tressler as attorneys fees, costs of court, printing transcripts and briefs, in the United States Circuit Court of Appeals, Fourth Circuit, and in The United States Supreme Court, should be allowed, for the reason said expenses were incurred in trying to shake his real property (business-income producing) loose from the clutches of the Florida Court, which continued to withhold it in Receivership although petitioner had been divorced from Ada A. Tressler in Nevada, on July 17, 1945. Petitioner, who was not a citizen or resident of the State of Florida would not submit his person to the jurisdiction of the Florida State Court, and was compelled to go into the United States District Court for the Southern District of Florida, as a non-resident, in order to try to rest his unlawfully withheld real property from the clutches of the Florida State Court. This was a business expenditure, and not a divorce or alimony action. This expenditure should be allowed. The District Court did not hold petitioner's Nevada divorce decree to be invalid, but dismissed his action because there was pending the State Court action, in other words the District Court instead of giving him the protection as a non-resident, that he was entitled to, said Court took the easiest way out, and like Pontius Pilate, merely washed its hands, and gave no relief, though the case cried out for relief. No necessity existed to withhold petitioners property to support Ada Tressler subsequent to July 17, 1945. He owed her no further

duty of support. The decision entered herein should be vacated and revised.

4. The Petitioner was entitled to an allowance for depreciation in 1947 as follows: On both apartments during January and February, 1947, and for the remaining six months, March 1, to August 31, 1947 on the Maxwell Court Apartments alone. The petitioner was entitled to have allowed to him depreciation in 1947 in amount of $1,812.40 whereas he was only allowed $830.00. Petitioner respectfully submits that the additional sum of $982.40 should be allowed, and the Decision be revised and vacated. The computation of this depreciation for the tax year 1947 is as follows:

15% on all furniture for 2 months ($11,000)	$ 276.00
15% on Maxwell Court furniture for 6 mos. ($6,000)	450.00
3% on both buildings for 2 months ($51,075.00)	255.40
3% on Maxwell Court bldg. for 6 mos. ($35,400.00)	831.00
Total 1947 depreciation to Aug. 31, 1947 sale date	$1,812.40

5. In the alternative, if the large expenditures of $6,535.00 for attorneys fees, printing and court costs, are not allowed in full, they should at least be allowed as a part of the cost of the real property, in that said expenditures were required to be made in establishing the state of the title, whether owned by petitioners' son, or held in trust as contended by Ada Tressler. She furnished no part of the purchase price, and sought to have the property title removed from Kenneth Tressler's name to that of S. B. Tressler so that she and her attorneys could subject it to depletion under the guise of providing her support. The expense should at least be

added to the cost of the land, however, in the interest of justice, the entire cost should be allowed as a necessary business expenditure made in protecting the business, income producing property of petitioner.

Wherefore, petitioner respectfully moves the Court to vacate the Decision entered herein on September 17, 1953 and revise the amount of the deficiency assessment, allowing petitioner the expenses and depreciation, and decreeing that the payments of $984.69 made to Ada A. Tressler as temporary alimony in 1947 are taxable to the former wife and not to petitioner.

And your petitioner will ever pray:

/s/ JOSEPH A. FITZSIMMONS,
Attorney for petitioner,
S. B. Tressler.

[Endorsed]: T.C.U.S. Filed October 19, 1953.

[Title of Tax Court and Cause No. 29044.]

PETITION FOR REVIEW

Comes Now the Petitioner, S. B. Tressler, a resident of Reno, Nevada, by his undersigned attorney, and within 3 months from the filing of the Decision and Final Judgment of The Tax Court of the United States in the above styled cause, entered on September 17, 1953, and within 3 months from filing of Motion to Vacate or Revise said Decision

filed October 19, 1953, and denied October 26, 1953, does hereby petition for Review of said Decision by Appeal to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California.

Nature of Controversy

The Tax Court of the United States by its Decision dated September 17, 1953, entered judgment against Petitioner for deficiency in income tax of $1,616.80 for the taxable year 1946 pursuant to Memorandum, Findings of Fact and Opinion entered March 31, 1953, and Respondent's Computations for Entry of Decision under Rule 50 of the Tax Court. (This case was tried jointly with case No. 35129 involving a claimed income tax deficiency for the tax year 1947.)

Said deficiency judgment was entered by The Tax Court against Petitioner by reason of payment of $5,334.86 under Order of a Florida Court dated January 7, 1946, by a Florida State Court Receiver to Ada A. Tressler, the former wife of Petitioner as annual support, Court costs and attorneys' fees. Petitioner, a resident of Nevada, was divorced from Ada A. Tressler, his wife, by Final Decree entered July 17, 1945, by the District Court of the Second Judicial District of the State of Nevada and said Final Decree has never been attacked in or vacated by the Nevada Court.

Point 1.

Petitioner contends that the Tax Court erred by failing to accord Full Faith and Credit to the

Nevada Divorce Decree and failed to recognize that Petitioner's lawful duty to provide support to his former wife, Ada A. Tressler, ceased on July 17, 1945, and that the payment of temporary alimony or support, attorneys' fees and Court costs made under Order of the Florida Court on January 7, 1946, subsequent to entry of the Divorce Decree rendered such payment by the Receiver taxable to Ada A. Tressler and not to the Petitioner.

Point 2.

The Tax Court erred in failing to allow Petitioner depreciation claimed by amended pleading of $3,-020.00 against the apartment buildings and furnishings only allowing $1,931.25.

Point 3.

The Tax Court erred in failing to allow the sum of $5,500.00 incurred by Petitioner in attempting to recover his income producing property from the Florida State Court Receivership wherein the legal title was attacked as being held in trust.

Petitioner being a resident of Reno, Nevada, and having filed his 1946 income tax return with the Collector of Internal Revenue at Reno, Nevada, on March 15, 1947, seeks Review by the United States Court of Appeals for the Ninth Circuit, San Francisco, California.

Wherefore, Petitioner feeling that grievous error has occurred upon entry of the Decision of The Tax Court of the United States against him in

this cause dated September 17, 1953, petitions for review thereof.

S. B. TRESSLER,
Petitioner,
/s/ By JOSEPH A. FITZSIMMONS,
Attorney for Petitioner.

State of Florida,
Broward County—ss.

Before me, the undersigned authority, personally apeared Joseph A. Fitzsimmons, who being well known to me and upon being first duly sworn, deposes and says: That he is attorney for the Petitioner, S. B. Tressler, that he is authorized to make this affidavit on behalf of said Petitioner; that he has read the foregoing Petition for Review, knows the contents thereof and avers that the same are true and further avers said Petition was not filed for purposes of delay.

/s/ JOSEPH A. FITZSIMMONS

Sworn to and subscribed before me this 16th day of December, A.D. 1953.

[Seal] /s/ JOHN W. BELL,
Notary Public, State of Florida at Large. My Commission expires October 14, 1955.

[Endorsed]: T.C.U.S. Filed December 17, 1953.

[Title of Tax Court and Cause No. 29044.]

AFFIDAVIT OF SERVICE

State of Florida,
Broward County—ss.

Before Me, the undersigned authority, personally appeared Joseph A. Fitzsimmons, who being well known to me and upon being first duly sworn, deposes and says: That he is attorney for S. B. Tressler, Petitioner; that he did on December 16, 1953, mail a copy of Petition for Review filed in the above styled cause to Honorable Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, Washington 25, D. C., together with copy of this Affidavit of Service.

/s/ JOSEPH A. FITZSIMMONS,

Sworn to and subscribed before me this 16th day of December, 1953.

[Seal] /s/ JOHN W. BELL,
Notary Public, State of Florida at Large. My commission expires: October 14, 1955.

[Endorsed]: T.C.U.S. Filed December 17, 1953.

[Title of Tax Court and Cause No. 35129.]

PETITION FOR REVIEW

Comes Now the Petitioner, S. B. Tressler, a resident of Reno, Nevada, by his undersigned attorney, and within 3 months from entry and filing of the Decision and Final Judgment of The Tax Court of the United States in the above styled cause, entered September 17, 1953, and within 3 months subsequent to the filing of a Motion to Vacate said Decision filed October 19, 1953, does hereby petition for Review of said Decision by appeal to the United States Court of Appeals for the Ninth Circuit at San Francisco, California.

By said Decision a Final Judgment in amount of $2,049.68 was entered against Petitioner for deficiency assessment for the tax year 1947 for income taxes based upon Memorandum, Findings of Fact and Opinion entered March 31, 1953, and Respondent's Computation for Entry of Decision under Rule 50 of the Tax Court. (This case was tried jointly with case No. 29044 involving a claimed income tax deficiency for the tax year 1946.)

Nature of Controversy
Point 1.

Petitioner, S. B. Tressler, is an individual, a resident of Reno, Nevada, and on July 17, 1945, obtained a Final Decree of Divorce in Reno, Nevada, from Ada A. Tressler, his former wife. By Order dated July 16, 1947, the Circuit Court of Broward

County, Florida, ordered its Receiver to pay to Ada A. Tressler $984.69 as support and $193.00 Court costs out of funds derived from rental property purchased by Petitioner and sequestered in March, 1945, but adjudged to have been held in trust by Kenneth Tressler, his son, and placed in receivership to pay support to Ada A. Tressler. Respondent charged said sum of $1,177.69 paid Ada A. Tressler in 1947 as income to Petitioner and Respondent was sustained by The Tax Court. Petitioner avers error occurred in that Full Faith and Credit was not accorded to the Nevada Divorce Decree.

Point 2.

Respondent disallowed the sum of $5,035.00 (increased to $6,535.00 by amended pleadings) and as attorneys' fees and Court costs in the Florida State Court and Appellate litigation wherein a Receiver was appointed and the title to the income producing property was adjudged to be held by Kenneth Tressler as Trustee for Petitioner. The attorneys' fees and Court costs incurred subsequent to July 17, 1945, were in an effort to recapture possession of the Petitioner's income producing property from the Florida Courts Receiver. The Respondent disallowed this claimed deduction and refused also to include this expense of litigation involving title and possession as part of the cost of the property. The Tax Court sustained the Respondent. Petitioner avers error occurred.

Point 3.

Respondent only allowed depreciation of $830.00 as against income, whereas the correct depreciation upon furniture and both apartments, while owned by Petitioner, amounted to $1,812.40. The Tax Court sustained the Respondent. Petitioner avers that error occurred.

Petitioner, a resident of Nevada, filed his 1947 Income Tax Return on January 12, 1948, with the Collector of Internal Revenue at Reno, Nevada, and feeling that error has occurred seeks review on appeal to the United States Court of Appeals for the Ninth Circuit and petitions for Review in order to obtain a reversal of said Decision of The Tax Court of the United States entered against Petitioner on September 17, 1953.

S. B. TRESSLER,

/s/ By JOSEPH A. FITZSIMMONS,
Attorney for Petitioner.

State of Florida,
Broward County—ss.

Before Me, the undersigned authority, personally appeared Joseph A. Fitzsimmons, who being well known to me and upon being first duly sworn, deposes and says: That he is attorney for the Petitioner, S. B. Tressler; that he is authorized to make this affidavit on behalf of said Petitioner; that he has read the foregoing Petition for Review, knows the contents thereof and avers that the same are

true; and further avers that said Petition was not filed for purposes of delay.

/s/ JOSEPH A. FITZSIMMONS

Sworn to and subscribed before me this 16th day of December, 1953.

[Seal] /s/ JOHN W. BELL,

Notary Public, State of Florida at Large. My Commission expires: October 14, 1955.

[Endorsed]: T.C.U.S. Filed December 17, 1953.

[Title of Tax Court and Cause No. 35129.]

AFFIDAVIT OF SERVICE

State of Florida,
Broward County—ss.

Before Me, the undersigned authority, personally appeared Joseph A. Fitzsimmons, who being well known to me and upon being first duly sworn, deposes and says: That he is attorney for S. B. Tressler, Petitioner; that he did on December 16, 1953, mail a copy of Petition for Review filed in the above styled cause to Honorable Kenneth W. Gemmill, Acting Chief Counsel, Internal Revenue Service, Washington 25, D. C. together with copy of this Affidavit of Service.

/s/ J. A. FITZSIMMONS

Sworn to and subscribed before me this 16th day of December, 1953.

[Seal] /s/ JOHN W. BELL,
Notary Public, State of Florida at Large. My commission expires: October 14, 1955.

[Endorsed]: T.C.U.S. Filed December 17, 1953.

[Title of Tax Court and Causes.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 25, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record" except original exhibits, admitted in evidence, which are separately certified and forwarded herewith, as the original and complete record in the proceedings before The Tax Court of the United States in the above entitled proceedings and in which the petitioner in The Tax Court proceedings has initiated appeals as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand

and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of January, 1954.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14205. United States Court of Appeals for the Ninth Circuit. S. B. Tressler, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of The Tax Court of the United States.

Filed: January 18, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

Docket No. 14205

S. B. TRESSLER, Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent on Review.

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

1. The Tax Court erred in failing to accord Full Faith and Credit or apply Rule of Comity to Petitioner's Nevada Final Decree of Divorce obtained July 17, 1945.

2. The Tax Court erred in failing to allow depreciation in applicable amount upon furnishings and Maxwell and Tarpon River apartment buildings.

3. The Tax Court erred in refusing to allow attorney's fees and expenses of litigation incurred by taxpayer in seeking recovery of his income producing property decreed to be held in trust and unlawfully withheld, from petitioner and his Trustee, in Florida State Court Receivership, solely to pay temporary support, attorney's fees and costs to his former wife, subsequent to his obtaining Final Decree of Divorce in Nevada.

/s/ JOSEPH A. FITZSIMMONS,
Attorney for Petitioner,
S. B. Tressler.

[Endorsed]: Filed January 28, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF RECORD

1. Memorandum, Findings of Fact and Opinion.

2. Petitioner's Motion for Reconsideration.

3. Respondent's Computation for Entry of Decision.

4. Decision entered (No. 29044) Sept. 17, 1953.

5. Petitioner's Motion to Vacate or Revise Decision (No. 29044).

6. Petition for Review (No. 29044).

7. Affidavit of Proof of Service (No. 29044).

8. Decision entered (Nos. 35129, 29044) Sept. 17, 1953.

9. Petitioner's Motion to Vacate or Review Decision (No. 35129).

10. Petition for Review (No. 35129).

11. Affidavit of Proof of Service (No. 35129).

* * * * *

17. Order June 28, 1945 (Fla. Chan. 10760) allowing Temporary Support, Attorney's Fees and Expenses.

* * * * *

20. Respondent's Exhibit "A", Petitioner's 1946 Income Tax Return.

* * * * *

23. Testimony of S. B. Tressler, page 26 to and

including page 37, line 23. (Official Report of Proceedings before The Tax Court.)

* * * * *

34. Excerpt from Official Report of Proceedings before the Tax Court relating to Section 65.10, Florida Statutes Annotated (1941) page 50 commencing line 10 and ending page 51 with line 1.

35. Certificate of Clerk of the Tax Court.

36. Statement of Points to be relied upon on Review.

37. Copy of this Designation.

38. Affidavit of Service of Statement and Designation.

/s/ JOSEPH A. FITZSIMMONS,
Attorney for Petitioner,
S. B. Tressler

[Endorsed]: Filed January 28, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTED RECORD

It is hereby stipulated and agreed subject to the approval of this Court, (1) that Petitioner's Exhibits numbered 1, 2, 4-11, 14-19, inclusive, and Respondent's Exhibits A, B, C, and E, originally designated by Petitioner for inclusion as parts of the printed record, shall be omitted as part of the printed record, since it appears that the printing thereof would render the printed record cumbersome and unnecessarily increase the costs of printing, and (2) that the parties hereto may refer to all the various exhibits on brief and in oral argument as though the same were part of the printed record.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Counsel for Respondent.
/s/ JOSEPH A. FITZSIMMONS,
Counsel for Petitioner.

[Endorsed]: Filed March 5, 1954. Paul P. O'Brien, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14205

S. B. TRESSLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF AND APPENDICES FOR THE PETITIONER

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14205

S. B. TRESSLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent,

ON PETITION FOR REVIEW OF THE
DECISIONS OF THE TAX COURT
OF THE UNITED STATES

**BRIEF AND APPENDICES
FOR THE PETITIONER**

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (Tr. 1-17) are not officially reported.

JURISDICTION

This appeal involves a deficiency in individual income taxes for the year 1946 in amount of $1,616.80 and for the year 1947 in amount of $2,049.68 and is taken from the decisions of the Tax Court entered September 17, 1953 (Tr. 16, 17). The case is upon appeal by Petitions for Review filed by the taxpayer, a resident of Reno, Nevada, on December 17, 1953 (Tr. 56-59, 61-65). The cases were tried together in the Tax Court. This Court has jurisdiction under the provisions of Title 26, U.S.C.A., Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, and Section 128 of the Act of May 24, 1949.

STATEMENT OF THE CASE

The petitioner, a resident of Reno, Nevada, filed his 1946 and 1947 income tax returns with the Collector at Reno, Nevada, and during each of said years claimed as dependents his wife, Pearl Ann Tressler, nee Pearl Ann Mounce, and 3 stepchildren and his aged mother, Katherine Tressler. (Respondent's Exhibits "A" and "B").

Thereafter the respondent filed deficiency assessments for 1946 and 1947 against petitioner on the

ground that the taxpayer had failed to return income of rents from Maxwell Court and Tarpon River Apartments at Fort Lauderdale, Florida, which income producing properties had been purchased in January 1945 by petitioner for his physically disabled son, Kenneth Tressler, after the son had received a medical discharge from the United States Army.

Said properties were sequestered and placed in receivership by the Circuit Court of Broward County, Florida, on **March 13, 1945,** and so held in receivership until **February 7, 1947.** The sole purpose of the sequestration and receivership was to provide support for petitioner's then wife, Ada Zoller Tressler, in an action for separate maintenance commenced by her in the Circuit Court of Broward County, Florida.

The marriage relationship between petitioner and Ada Zoller Tressler began on August 25, 1944, and terminated by Final Decree of Divorce obtained by petitioner at Reno, Nevada, July 17, 1945 (Petitioner's Exh. No. 4). Ada Tressler did not appear or contest the Nevada divorce action, although she was served by publication and had actual knowledge thereof.

Neither petitioner nor his then wife, Ada Tressler, were residents of the State of Florida and petitioner at no time appeared or submitted himself to the Florida State Courts jurisdiction.

The son, Kenneth Tressler, subsequent to his father's divorce from Ada Tressler, did attempt to file an Answer in the Florida State Court setting up the petitioner's divorce decree, but the Florida State Court

would not permit the Answer to be filed. Decree Pro Confesso was obtained against both father and son.

The Florida State Court on **January 7, 1946,** held that the father had purchased the properties and that the title thereto was held **in trust** by Kenneth Tressler for his father, Shriver B. Tressler (Respondent's Exhibit "E").

By Order dated **January 17, 1946,** subsequent to the Nevada divorce, the Florida State Court ordered its receiver to pay certain funds collected as rents to Ada Tressler, the former wife of petitioner, as "temporary alimony, court costs and attorneys' fees" (Respondent's Exhibit "E").

Kenneth Tressler having appeared in the Florida State Court action appealed to the Supreme Court of of Florida, but that Court affirmed the lower Court and Certiorari to the Supreme Court of the United States was perfected but denied, likewise Petition for Rehearing Jan. 1947.

In the meantime on March 21, 1946, Shriver B. Tressler filed suit in the District Court of the United States for the Southern District of Florida against his former wife, Ada Zoller Tressler, and the State Court Receiver seeking to wrest from sequestration and receivership the income producing properties held in trust by Kenneth Tressler and for the benefit of petitioner's former wife, Ada Zoller Tressler. Petitioner relied upon his Nevada divorce decree and diversity of citizenship. The bill was dismissed and

appeal was taken to the Circuit Court of Appeals for the Fifth Circuit.

Upon denial of Certiorari by the United States Supreme Court and having failed to obtain relief in the United States District Court for the Southern District of Florida, petitioner was compelled to submit to a property settlement agreement with his former wife, Ada Zoller Tressler, under which, although they had only lived together about 5 months, he was compelled to convey to her properties worth about $70,000.00 and the entire proceeds of rents collected from the Maxwell Court and Tarpon River apartment buildings by the Receiver.

Under the terms of the settlement petitioner recovered the Maxwell Court Apartments on February 7, 1947, in a very run down condition.

Petitioner claimed depreciation for 1946 upon said apartment building and legal expense incurred in attempting to recover possession of his income producing properties although he did not receive any income therefrom.

All of the rents collected by the State Court Receiver from the trust properties from March 13, 1945 to February 7, 1947, were disbursed to his former wife, Ada Zoller Tressler, as temporary alimony, court costs and attorneys' fees under Orders of the Florida State Court entered subsequent to the Nevada divorce decree dated **July 17, 1945.** The petitioner did not receive any of such revenue and the respondent seeks to compel petitioner to pay income taxes thereon by means of deficiency assessments for 1946 and 1947.

SPECIFICATION OF ERRORS RELIED UPON

(1) The Tax Court failed to accord full faith and credit to the Final Decree of Divorce entered by the Nevada Court on **July 17, 1945,** upon the ground of extreme cruelty, and

(2) The Tax Court failed to consider that the payments made to the former wife by the Order of the Florida State Court dated January 17, 1946, were made from properties held in trust and subsequent to divorce and were taxable to the former wife, Ada Zoller Tressler, and not to petitioner.

(3) The Tax Court erred in failing to allow petitioner to claim full allowable depreciation upon furniture and buildings.

(4) The Tax Court erred in failing to allow petitioner to deduct attorneys' fees and costs of printing record and briefs upon appeal in litigation seeking to terminate receivership over petitioner's income producing properties.

ARGUMENT

FIRST POINT

THE TAX COURT FAILED TO ACCORD FULL FAITH AND CREDIT TO THE NEVADA FINAL DECREE OF DIVORCE OBTAINED BY PETITIONER, DATED JULY 17, 1945.

The Tax Court in its findings held that neither petitioner or his then wife, Ada Tressler, were citizens of the State of Florida, but merely went to Florida to spend the winter (Tr. 2). Neither party had resided in Florida for 90 days as bona fide residents of Florida and were not citizens or domiciled therein. The wife merely sought separate maintenance in an action unconnected with grounds of divorce (App. B. See 65.10, Florida Statutes).

The State of Florida grants and recognises divorces obtained upon constructive service of process and the Final Decree obtained by petitioner in Nevada dated July 17, 1945, never has been attacked or impeached.

Pawley v. Pawley, 160 Fla. 903, 46 So. 2d. 464, 474, 28 ALR. 2d 1358, cert. denied 340 U.S. 866, 71 S. Ct. 90, 95, L.Ed. 632.

Stewart v. Stewart (1934) 115 Fla. 158, 155 So. 114, 115

Gaylord v. Gaylord, Fla. 45 So. 2d. 507, 509.

The Tax Court of the United States must accord full faith and credit to the divorce decrees of the several states and only the States themselves hold the right to

inquire into the validity thereof when their own citizens' marital rights are affected and only then when made a matter for judicial determination.

Baldwin v. Baldwin (1946) 170 P. 2d 670, 28 Cal. 2d 406

Lynn v. Lynn (1951) 97 NE 2d 748, 302 NY 193 28 ALR 2d 1335 cert. den. 72 S. Ct. 72, 342 US, 849, 96 L.Ed. 640

Herrick v. Herrick, 55 Nev. 59, 68, 25 P 2d, 378

Sweeney v. Sweeney, 42 Nev. 431, 438, 179 P. 638, 639

The right to receive support is only accorded to a wife and upon termination of the marriage relationship the duty to support ceases.

Pawley v. Pawley 160 Fla. 903, 46 So. ed. 464, 474, 28 ALR. 2d. 1358

Chirgwin v. Chirgwin (1938) 26 Cal. App. 2d 506, 79 P. 2d 772

Rodda v. Rodda (1948) 185 Or. 140, 200 P. 2d 616, 202 P. 2d 638, cert. den. 337 US. 946, 93 L. Ed. 1749, 69 S. Ct. 1504

Section 65.10, Florida Statutes, Appendix "B".

SECOND POINT

THE TAX COURT FAILED TO CONSIDER THAT THE PAYMENTS MADE TO THE FORMER WIFE BY THE ORDER OF THE FLORIDA STATE COURT DATED JANUARY 17, 1946, WERE MADE FROM PROPERTIES HELD IN TRUST AND SUBSEQUENT TO DIVORCE AND WERE TAXABLE TO THE FORMER WIFE, ADA ZOLLER TRESSLER, AND NOT TO PETITIONER.

Although the wife's action for separate maintenance was commenced first, the entry of the Divorce Decree terminated all right to temporary alimony under the interlocutory Order in the Florida action, at least until there had been a determination of the validity of the foreign divorce decree.

Pawley v. Pawley 160 Fla. 903, 46 So. 2d. 464, 474, 28 ALR 2d, 1358

Chirgwin v. Chirgwin (1938) 26 Cal. App. 2d 506, 79 P. 2d 772

Atkins v. Atkins (1944) 386 Ill. 345, 54 NE 2d. 488
Frank v. Frank (1951) N. J. 81 A. 2d 172

The action of the Florida Court ordering payments of "temporary alimony under the interlocutory Order to the former wife out of funds derived from property sequestered and placed in receivership to enforce orders for separate maintenance to the former wife, such orders being entered subsequent to the divorce decree, come within the provisions of Title 26, U.S.C.A.,

Section 22(k), 23(u), 171 and Section 3797 (Appendix "A") as being payments required subsequent to divorce under Court Order out of trust funds and all such payments including court costs and attorneys' fees were chargeable as income to the former wife and not to the petitioner herein.

THIRD POINT

THE TAX COURT ERRED IN FAILING TO ALLOW PETITIONER TO CLAIM FULL ALLOWABLE DEPRECIATION UPON FURNITURE AND BUILDINGS.

The record shows that the Maxwell Court Apartments was purchased and rented furnished (Tr. 3). The furniture was valued at $6,000.00 and the buildings at $35,400.00. Depreciation at 15% of $6,000.00 on the furniture for 1946 amounted to $900.00; and on the buildings at 3% of $35,400.00 amounted to $1,062.00 making a total depreciation for 1946 allowable on the Maxwell Court Apartments alone of $1,962.00. Only $1,931.25 was claimed on both buildings.

The record shows the Tarpon River Apartments were purchased and rented furnished (Tr. 3). The furniture was valued at $5,000.00 and the building at $15,675.00. The 1946 depreciation on this furniture, 15% of $5,000.00, was $750.00 and 3% upon the building $470.25, making a total depreciation allowable on the Tarpon River Apartments of $1,120.25.

The correct allowable depreciation on both buildings for 1946 was $1,962.00 plus $1,120.25 or $2,082.25

and this amount should have been allowed petitioner for the reason his buildings were being depreciated and all of the income therefrom was being impounded to pay support to his former wife, court costs, attorneys' fees and receiver's fees.

The Tax Court erred in holding (T. 14) that the evidence does not contain any evidence on which it could reasonably make a finding on the issue raised by amended pleading that the correct depreciation for 1946 was the sum of $3,020.00.

FOURTH POINT

THE TAX COURT ERRED IN FAILING TO ALLOW PETITIONER TO DEDUCT ATTORNEYS' FEES AND COSTS OF PRINTING RECORD AND BRIEFS UPON APPEAL IN LITIGATION SEEKING TO TERMINATE RECEIVERSHIP OVER PETITIONER'S INCOME PRODUCING PROPERTIES.

The Tax Court in denying the petitioner's claim for legal expenses expended in trying to recover possession of his income producing properties from the clutches of the Florida State Court Receivership decreed to be held in trust for petitioner and sequestered to provide a means to continue to pay separate support and maintenance to the former wife, Ada Tressler, overlooks the fact that this added expense was enforced upon petitioner after he had obtained his decree of divorce by the Courts of a state in which he

had never been domiciled, but merely had purchased income producing property.

Whatever the right of the Florida Court to exercise its powers to prevent the wife from becoming a public charge (she had ample means with which to live and litigate given to her by her husband). Said state of Florida did not hold jurisdiction over the marital res, neither of the spouses were bona fide residents of the State of Florida, they being merely tourists spending the winter (Tr. 2).

Consequently the Florida Court's duty to provide Ada Tressler with support ceased upon entry of the Nevada divorce decree on July 17, 1945, and it should have accorded said final decree full faith and credit when plead by Kenneth Tressler in October 1945 (Tr. 4) since it was his property which had been taken from him to provide a means of support for Ada Tressler.

Kenneth Tressler having been by the Florida Court held to be a constructive trustee in holding title to the apartment buildings purchased by his father thereby brought in question the exact nature of the title to the property and since it did present a question of title, then the least the respondent should have done, was to allow the cost of the Maxwell Court Apartment building to be increased by the Court costs and attorneys' fees incurred by petitioner and his constructive trustee in defending and maintaining litigation seeking to protect the title and right to possession and right to receive the earnings from the income producing property.

The act of the Florida Court imposed a duty upon the owner of the property to seek its recovery. This was a necessary business expense, petitioner was attempting to conserve his 12 unit apartment business held for the production of income. (Vincent v. C.I.R. (1952) 18 T. C. 339) USCA Title 26, Section 23, (a) (2).

CONCLUSION

Petitioner respectfully submits that the Tax Court in entering its Decisions (Tr. 16, 17) imposing $1,616.80 and $2,049.68 additional income tax upon petitioner for the tax years 1946 and 1947 erred in that the income earned by the trust property and paid under Order of Court to the former wife of petitioner subsequent to divorce was taxable as income to the former wife and not to petitioner, he not having ever received one cent of revenue from the properties between March 1945 and February 1947.

The Tax Court likewise erred in disallowing petitioner the total amount of depreciation to which he was entitled upon the two furnished apartment houses; the cost of the buildings and furniture appearing in the record.

The Tax Court erred in failing to consider that the incurring of legal expenses in connection with litigation the purpose of which was to regain possession and control of the income producing business property from the Florida State Court Receivership was a necessary business expense and should have been al-

lowed the taxpayer, no attempt was made to include the attorneys' fees incurred in petitioner's divorce action.

WHEREFORE, petitioner sincerely trusts each of the Decisions dated September 17, 1953, will be reversed.

Respectfully submitted,

/s/ JOSEPH A. FITZSIMMONS,
212-214 Maxwell Arcade
Fort Lauderdale, Florida

Attorney for Petitioner
Shriver B. Tressler

APPENDIX A

U. S. CODE

Title 26, § 22: "(k) ALIMONY, ETC., INCOME. In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * *"

Title 26, § 23: "(u) ALIMONY, ETC., PAYMENTS. In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection. * * *"

Title 26, § 171: "INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC. (a) INCLUSION IN GROSS INCOME. There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. * * *"

"(b) WIFE CONSIDERED A BENEFICIARY. For the purpose of computing the net income of the estate or trust and the net income of the wife described in section 22(k)

or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included. Added Oct. 21, 1942, 4:30 p.m., E.W.T., c. 619, Title I, § 120(c), 56 Stat. 817."

Title 26, § 25: "(3) DEFINITION OF DEPENDENT. As used in this chapter the term "dependent" means any of the following persons over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer:

"* * * A payment to a wife which is includible under section 22(k) or section 171 in the gross income of such wife shall not be considered a payment by her husband for the support of any dependent. 53 Stat. 17, amended June 25, 1940, 11:45 a.m., E.S.T. c. 419, Title I, § 6(a), 113, 55 Stat. 696, 697; Oct. 21, 1942, 4:30 p.m., E.W.T., c. 619, Title I, §§ 112(b), 120(e) (1), 126(i) (1), 131(a) (1), (b), 56 Stat. 811, 818, 825, 827, 828; Feb. 25, 1944, 12:49 p.m., E.W.T., c. 63, Title I, §§ 103, 107(a), 58 Stat. 31; May 29, 1944, 7 p.m., E.W.T., c. 210, Part I, § 10 (a, b), 58 Stat. 238; Nov. 8, 1945, 5:17 p.m., E.S.T., c. 453, Title I, § 102(a), (b) (2), 59 Stat. 558; Apr. 2, 1948, 3:18 p.m., E.S.T., c. 168, Title II, § 201, 62 Stat. 112."

Title 26, § 3797: DEFINITIONS.

"(7) HUSBAND AND WIFE. As used in sections 22(k), 23(u), 171, and the last sentence of section 25(b) (3), if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of such sections, the term "wife" shall be read "former wife" and the term "husband" shall be read "former husband"; and, if the payments described in such sections are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versal wherever appropriate to the meaning of such sections, the term "husband" shall be read "wife" and the term "wife" shall be read "husband". * * *"

APPENDIX B

FLORIDA STATUTES ANNOTATED

65.02 RESIDENCE REQUIRED

In order to obtain a divorce the complaint must have resided ninety days in the State of Florida before the filing of the bill of complaint.

65.03 ALL DIVORCES TO BE A VINCULO

No divorce shall be from bed and board, but every divorce shall be from bonds of matrimony.

65.04 GROUNDS FOR DIVORCE

No divorce shall be granted unless one of the following facts shall appear:

(1) That the parties are within the degrees prohibited by law.

(2) That the defendant is naturally impotent.

(3) That the defendant has been guilty of adultery.

If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

(4) Extreme cruelty by defendant to complainant.

(5) Habitual indulgence by defendant in violent and ungovernable temper.

(6) Habitual intemperance of defendant.

(7) Willful, obstinate and continued desertion of complainant for one year.

(8) That the defendant has obtained a divorce from the complainant in any other state or country.

(9) That either party had a husband or wife living at the time of the marriage sought to be annulled.

65.09 ALIMONY UNCONNECTED WITH DIVORCE

If any of the causes of divorce set forth in § 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife.

65.10 ALIMONY UNCONNECTED WITH CAUSES OF DIVORCE

If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution.

APPENDIX C

No. 90072
Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

SHRIVER BERT TRESSLER, Plaintiff,	Filed Jul 17 2:04 PM '45
vs.	E. H. BEEMER, CLERK
ADA ZOELLER TRESSLER, Defendant.	By V. Whitehead Deputy

DECREE

This case came on regularly for trial before the undersigned Judge of said Court, sitting without a jury, Plaintiff appearing by and through his attorney, Lloyd V. Smith, Esq., Defendant not appearing, although the Defendant was served in accordance with the order of this Court by publication and mailing, and more than thirty days having elapsed since service was completed in both respects, and the Defendant having failed to answer or otherwise appear in the time allowed by law ,the default of the Defendant was noted and entered at length in the Minutes, and such proceeding were regularly had herein that on the 17th day of July, 1945, the Court rendered its decision in favor of the Plaintiff and against the Defendant, made and entered herein its certain Findings of Fact and Conclusions of Law and order that Judgment be entered accordingly.

NOW, THEREFORE, in consideration of the premises and in conformity with said Decision, Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

That Plaintiff be, and he hereby is, granted a decree of divorce from Defendant, on the ground of extreme cruelty, same being final and absolute in form, force and effect, the laws of the State of Nevada providing no interlocutory period or conditions or restrictions on remarriage; and that the bonds of matrimony now and heretofore existing between Plaintiff and Defendant are fully, completely and forever dissolved and that Plaintiff and Defendant are both and each hereby restored to the status of single persons.

DONE IN OPEN COURT this 17th day of July, 1945.

EDGAR EATHER
District Judge
Presiding.

RECORDED IN JUDGMENT RECORD
Book A 71, Page 181

E. H. BEEMER, COUNTY CLERK
By B. Buchanan, Deputy Clerk

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

SHRIVER BERT TRESSLER, Plaintiff
vs.
ADA ZOELLER TRESSLER, Defendant

No. 90,072
Dept. No. 1

I. E. H. BEEMER, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy, attached hereto is a full, true and correct copy of the DECREE and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside, but is still of full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court this 6 days of August, A.D. 1945.

COURT
SEAL

E. H. BEEMER, County Clerk

I, Wm. McKnight, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that both of said two judges are placed by law on an equality as to authority; that E. H. BEEMER, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand that 6 day of August, A.D. 1945.

WM. McKNIGHT
One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

STATE OF NEVADA, }
County of Washoe } ss.

I, E. H. BEEMER, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable Wm. McKnight whose name is subscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 6 day of August A.D. 1945.

COURT
SEAL

E. K. BEEMER
County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

Book 127, Page 62

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA IN CHANCERY.

No. 10760

ADA A. TRESSLER,
Plaintiff,
vs.
SHRIVER B. TRESSLER, et al,
Defendants.

ORDER

This cause came on to be heard upon motion of the Plaintiff for the entry of an order that all the property set out and described in Plaintiff's Bill of Complaint and the amendments thereto, and the returns and profits therefrom, be decreed to be held in trust by the Defendant, Kenneth Tressler, for the use and benefit of the Defendant, Shriver B. Tresler, the Bill of Complaint herein and the amendments thereto, the exhibits thereto, the decree pro confesso, hereto fore duly and regularly entered against the Defendant, Shriver B. Tressler, and the decree pro confesso, heretofore duly and regularly entered against the Defendant, Kenneth Tressler, the testimony adduced before the Court in behalf of Plaintiff, the evidentiary exhibits introduced by Plaintiff, and the whole record in said cause, and it appearing that the Court has jurisdiction of the parties and the subject matter, and being fully advised in the premises, it is,

ORDERED, ADJUDGED AND DECREED that the following described property located in Broward County, Florida, including the rents and profits therefrom, heretofore sequestrated by this Court, placed in the hands of a receiver, and the rents and profits in the hands of the receiver, to-wit:

(1). Lots eighteen (18) and Nineteen (19) of Block thirty-nine-L (39L) of CROISSANT PARK, according to the plat thereof recorded in Plat Book 4, page 28, of the public records of Broward County, Florida.

Respondent's Exhibit "E"

(2). Lots nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24) in Block four (4), according to the plat of Lauderdale now on record in the office of the Clerk of the Circuit Court, for the County of Dade and State of Florida, in plat book 2 at page 9 of said records, subject to the Federal Highway Easement over the East Eight (8) feet of Lot twenty-four (24).

(3). Lots one (1), two (2) and three (3) of Block thirty (30) of NORTH LAUDERDALE, an addition to the Town of Ft. Lauderdale, according to the plat thereof recorded in Plat Book 1, page 182, of the public records of Dade County, Florida.

(4). Lot thirteen (13) of Block four (4) of TARPON RIVER PARK, according to the plat thereof recorded in plat book 15, page 44, of the public records of Broward County, Florida, and

the rents and profits from the above-described premises now in the hands of Ruth Westerberg, receiver, and all future rents and profits derived or to be derived from said premises, together with all the real estate hereinabove described are held in trust by the Defendant, Kenneth Tressler, for the Defendant, Shriver B. Tressler, and that the said Shriver B. Tressler is the equitable and beneficial owner of all of said property, both real and personal hereinabove described, and that the record legal title of said property is held by the Defendant, Kenneth Tressler, in trust for the defendant, Shriver B. Tressler.

DONE and ORDERED this 7th day of January, A.D. 1946.

/s/ GEORGE W. TEDDER
Circuit Judge

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record 7th day January 1946 and recorded CHANCERY ORDER BOOK 127, page 62. Record Verified.

TED CABOT, Clerk
By /s/ Zenda Alexander, D.C.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA.
IN CHANCERY No. 10760

ADA A TRESSLER,
Plaintiff,
vs.
SHRIVER B. TRESSLER, et al.,
Defendants.

ORDER

This cause coming on to be heard upon plaintiff's verified motion for the entry of an order for the enforcement of her lien for the amount of $300.00 per month as temporary alimony and support from March 3rd, 1945 to June 28th, 1945, the enforcement of her lien for $334.86 costs expended by her up to and including the 28th day of June 1945 and temporary attorneys' fees in the amount of $2,000.00 under and by virtue of an order of this Court dated June 28th, 1945 and for the entry of an order that the sum of $300.00 per month as alimony and support allowed plaintiff under the order of this Court dated June 28th, 1945 from June 28th, 1945 to an including January 3rd, 1946, to be and constitute a lien on all of the property set-out and described in plaintiff's Bill of Complaint and amendments thereto and the rents and profits derived therefrom, located in Broward County, Florida, and that such lien for temporary alimony and support from March 3, 1945 up to and including January 3rd, 1946

In the amount of	$3,000.00
Costs expended to June 28th, 1945 in the amount of	334.86
And temporary attorneys' fees allowed by Court in order dated June 28th, 1945 in the amount of	2,000.00

be enforced and paid out of the real estate set-out and described in her Bill of Complaint and amendments thereto

and the rents and profits derived therefrom now in the hands of Ruth Westerberg, Receiver, and all of said property located in Broward County, Florida; that the money in the hands of the receiver be ordered paid to the plaintiff,

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or her said attorneys, Davis & Lockhart, within one day after receipt of a true copy of the order of this Court, and credited upon the amount due her and that this Court order sold sufficient of the real estate to satisfy the balance due plaintiff.

It appears from the report of the receiver filed in this cause on the 14th day of January A.D. 1946, that she has in her hands and deposited in the bank on December 31st, 1945, $5,209.89 received as rent;

That it appears from the report of the receiver filed on the 5th day of December 1945, that the receiver had in the bank as of November 30, 1945, the sum of $3,527.90;

The the net rents collected during December amounted to $1,681.99;

That it appears from the verified motion herein that rents due and payable and to be collected by the Receiver during the month of January 1946, will be in excess of $1,500.00 and

That it further appears to the Court that by February 1st, 1946 there should be ample funds in the hands of the Receiver to pay the whole of plaintiff's claim set-out in her motion, together with receiver's fees, costs and attorney's fees and that it will not be necessary at this time to order any of the real estate sold for the purpose of paying the amount, or any part thereof, set-out in plaintiff's motion It further appearing to the Court that no part of temporary alimony and support, costs and temporary attorneys' fees set-out and decreed to plaintiff in the order of this Court of June 28th, 1945, has been paid and the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED

(1) That the amount of temporary alimony and support of $300.00 per month from March 3rd, 1945 to June 28th, 1945, the amount of costs expended by plaintiff up to and including June 28th, 1945, in the amount of $334.86 and temporary attorneys' fees in the amount of $2,000.00 under and by virtue of an order dated June 28th, 1945, constituted a lien on all of the property set-out and described in plaintiff's Bill of Complaint and amendments thereto located in Broward County, Florida and the rents and profits derived therefrom.

(2) That the temporary alimony and support in the amount of $300.00 per month due plaintiff from June 28th, 1945 to January 3rd, 1946, be, and the same is hereby decreed to be a lien upon all of the property-set-out and described in plaintiff's Bill of Complaint and the amendments thereto located in Broward County, Florida, and also the rents and profits derived therefrom.

(3) That there is due and unpaid to plaintiff up to and including January 3rd, 1946 as temporary alimony and support the sum of $3,000.00; her costs expended to June 28th, 1945 in the amount of $334.86 and temporary attorneys' fees allowed her by order of this Court on June 28th, 1945, in the amount of $2,000.00 making a total sum of $5,334.86.

(4) That the receiver, Ruth Westerberg, be, and she is hereby ordered to pay to plaintiff, or her attorneys, Davis & Lockhart, or either of them, taking receipt therefore, within one day after the receipt of a true copy of this order of the Court, the amount of $5,334.86, if sufficient funds is in her hands so to pay and if not, to pay the amount in her hands held as such receiver in this cause to be credited upon the amount here so ordered to be paid and thereafter to pay the balance of said sum as soon as sufficient funds is received by her to so pay said balance.

(5) Jurisdiction is hereby retained by this Court to enforce all matters and things herein adjudicated.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 17th day of January A.D. 1946.

/s/ GEORGE W. TEDDER
Judge

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record 17th day January 1946 and recorded CHANCERY ORDER BOOK 127, page 163. Record Verified.

TED CABOT, Clerk

By /s/ Zenda Alexander, D.C.

Book 140, Page 356

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA.

No. 10760

ADA A. TRESSLER,
Plaintiff,
vs
SHRIVER B. TRESSLER
KENNETH TRESSLER and
RUTH WESTERBERG, as Receiver,
Defendants.

FINAL DECREE

The original suit filed in this cause on March 7, 1945, prayed for temporary and permanent alimony unconnected with divorce, and for suit money to compensate her attorneys for services to be rendered, against the defendant, Shriver B. Tressler, as the husband of plaintiff. She further sought a declaratory decree adjudging certain real estate described in the bill of complaint to be held in trust by the defendant Kenneth Tressler for the defendant Shriver B. Tressler; further, that an injunction be entered restraining the defendant, Kenneth Tressler and Shriver B. Tressler from transferring any of said properties, and that a Receiver be appointed to take charge of the same. A Lis Pendens was filed on the same date. On March 13, 1945, at a hearing held on the bill of complaint and subsequent amendments thereto, and the answer of the defendant Ruth Westerberg, as Agent for the defendant Shriver B. Tressler, Ruth Westerberg was appointed Receiver of the property known as Tarpon River Apartments and the Maxwell Apartments. The injunction as prayed was entered against the defendants Shriver B. Tressler and Kenneth Tressler. The Court directed the Receiver to permit the plaintiff to occupy apartment No. 3 in the Maxwell Apartments without pay-

Book 140, Page 357

ment of rent therefor, and that Ruth Westerberg, the Receiver be permitted to occupy one apartment in the Tarpon River Apartments from May 1st, 1945, to May 1st, 1946, at the rental of seventy-five ($75.00) dollars per month, which sum she was not required to pay until her compensation as Receiver was fixed by the Court.

Many pleadings were filed in the cause, and many hearings thereon were had. Four different decrees on different phases of the case were appealed to the Supreme Court of Florida, all of which were affirmed, and to the last decree, after affirmance by the Supreme Court of Florida, petition for writ of certiorari was filed in the Supreme Court of the United States, which petition was denied by said court. A suit was also filed by the Tresslers against the plaintiff herein, and the Receiver in the United States District Court for the Southern District of Florida, which suit was dismissed by the Court, and an appeal taken to the Circuit Court of Appeals of the Fifth Judicial Circuit. After all of this litigation a compromise property settlement was effected by which certain valuable properties were conveyed to the plaintiff. The settlement further provided that the funds in the hands of the Receiver derived from the rent of the properties involved be disbursed by said Receiver as follows:

(1) Compensation due the receiver for her services.

(2) The amount due the firm of Davis & Lockhart for expenditures made by them in representing the Receiver, together with Ada A. Tressler, in the United States Supreme Court, United States District Court, and the United States Circuit Court of Appeals.

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(3) The amount, if any, to be paid to the Receiver's attorneys, Hugh Lester and Davis & Lockhart.

(4) And the balance, if any, to the plaintiff, Ada. A. Tressler.

A controversy arose between the parties as to how these funds should be disbursed by the Receiver. Some testimony on this question was heard before the Court, and the remainder of the testimony before the Special Master, who was appointed to complete the testimony and make his findings of law and fact. Exceptions were filed by Davis & Lockhart on their own behalf, by the plaintiff and by the Receiver. The Special Master recommended that the Receiver be allowed as compensation fifteen per cent of the aggregate sum of the rents collected, which amounted to $3134.46, from which sum should be deducted the rental of the apartment occupied by her for twenty-one (21) months, at seventy-five ($75.00) dollars per month, or a total of $1575.00, leaving a balance due the Receiver of $1559.46. He further recommended that Hugh Lester, attorney for the Receiver be allowed a fee of $1500.00; that Davis & Lockhart be allowed $362.55 for expenses incurred in litigation in the Federal Courts, and a fee of $500.00 for representing the Receiver in the Federal Courts.

The plaintiff and Davis & Lockhart in their exceptions to the award to the Receiver, and to the Receiver's attorney, contend that the fees allowed are excessive. Davis & Lockhart also contend that the fee awarded to them for representing the Receiver in the Federal Courts is inadequate. The Receiver excepts to the award made to her and contends that it is inadequate. As to the awards made to the Receiver, and the Receiver's attorney, the exceptions thereto should be overruled. The work performed by the Receiver,

and the services rendered by the attorney was made more difficult by the conditions and circumstances of the times in which they labored. With so many questions confronting the Receiver almost daily, she would of necessity frequently consult her attorney, so as to avoid errors in deciding the problems presented.

I do not agree with the contention as made that the fees awarded to the receiver and her attorney should be materially reduced, because it would deprive the plaintiff of the fruits of a property settlement to which she would otherwise be entitled. The Master correctly held that the Receiver was only a nominal party to the proceedings. The real party in interest was the plaintiff, without whom no suit of any kind could have been maintained. Her interests were primary and the Receiver's interest was a mere incident connected with the suit. She performed nevertheless an important service, and the fact that a Receiver was appointed no doubt aided in the settlement agreement. The suit was filed to secure support for the plaintiff, and the seizure of the property involved made it possible for her to enforce a judgment for such support, if entered. She has no right to complain. The first decree entered in the case gave her the right to occupy one of the apartments without the payment of the rent. The settlement agreement provided for the conveyance of property valued at many thousands of dollars. She stipulated and agreed that the funds in the hands of the Receiver be used to pay the Receiver and the various attorneys mentioned therein. Each of these individuals rendered splendid service which resulted in benefit to her and neither of these persons is overpaid by the awards here made.

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I am inclined to sustain the objection of Davis & Lockhart to the award of $500.00 for their services as attorneys for the Receiver in all of the federal Courts. The suit filed in the United States District Court was more directly against the Receiver, although the interests of the plaintiff were more largely involved. The same is true of the appeal to the United States Supreme Court. It would be difficult to separate the services rendered to the plaintiff and to the Receiver. The questions presented for each were almost identical. The attorneys are contending for $2500.00 for their services in representing the Receiver, which sum is inadequate for all of the services rendered by them in the

Federal Courts. In view of the great amount of work done, the difficult questions of law presented, and the many hearings attended I do not think that an award of $2500.00 for services to the Receiver is excessive.

Thereupon, IT IS ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the exceptions to the Special Master's Report as to the awards made to the Receiver and to her attorney, be and they are hereby overruled, and that the Receiver, RUTH WESTERBERG, be paid the sum of $3134.46 for her services as Receiver, less the sum of $1575.00 for the rental of an apartment occupied by her, leaving a balance due her of $1559.46, and that a fee of $1500.00 be paid to Hugh Lester, as attorney for said Receiver.

(2) That the exceptions to the Special Master's Report as to the fee awarded to the firm of Davis & Lockhart for services rendered to the Receiver in all of the Federal Courts be, and the same is hereby overruled.

(3) That the sum of $362.55 be paid to the firm of Davis

& Lockhart for expenses incurred in the litigation in all of the Federal Courts.

(4) That a fee of $2500.00 be, and the same is hereby awarded to the firm of Davis & Lockhart, as attorneys, for services rendered to the Receiver, in all the Federal Courts.

(5) That all the costs accrued but not paid, shall be paid to the persons entitled to receive the same.

(6) That the remaining sums of money in the hands of the Receiver be paid over the the Plaintiff herein, ADA A. TRESSLER.

DONE AND ORDERED, this the 16th day of July, 1947.

/s/ GEORGE W. TEDDER
Circuit Judge

STATE OF FLORIDA, BROWARD COUNTY

This instrument filed for record 16th day of July 1947 and recorded CHANCERY ORDER BOOK 140, page 356. Record Verified.

TED CABOT, Clerk

By /s/ Zenda Alexander, D.C.

No. 14205

In the United States Court of Appeals for the Ninth Circuit

S. B. TRESSLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
GEORGE F. LYNCH,
Special Assistants to the Attorney General.

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In the United States Court of Appeals
for the Ninth Circuit

No. 14205

S. B. TRESSLER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 1-15) are not officially reported.

JURISDICTION

The petitions for review (R. 56-59, 61-64) involve deficiencies in individual income taxes for the years 1946 and 1947 in the respective amounts of $1,616.80 and $2,049.68.

A notice of deficiency was mailed to taxpayer on March 14, 1950, with respect to the year 1946. On June 12, 1950, taxpayer filed with the Tax Court a petition for redetermination under the provisions of Section 272 of the Internal Revenue Code.

The notice of deficiency for 1947 was dated March 14, 1951. (R. 2.) On June 11, 1951, taxpayer filed a petition for redetermination with the Tax Court under the provisions of Section 272 of the Internal Revenue Code.

The decisions of the Tax Court were entered on September 17, 1953. (R. 16, 17.) The cases are brought to this Court by petitions for review filed on December 17, 1953. (R. 59, 64.) Jurisdiction is conferred on this Court by Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding that the payment to taxpayer's wife by a receiver, pursuant to court order, of temporary support, attorneys' fees and court costs from funds in the hands of the receiver which belonged to taxpayer, constituted income taxable to taxpayer.

2. Whether the Tax Court erred in holding that legal expenses incurred by taxpayer in contesting his wife's suit for temporary alimony were not deductible as non-business expenses under Section 23(a)(2) of the Internal Revenue Code.

3. Whether the Tax Court erred in refusing to allow a claim for increased depreciation on rental properties under Section 23(1) where the taxpayer failed to prove his right thereto.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The findings of the Tax Court may be stated as follows:

Taxpayer is an individual residing in Reno, Nevada. He filed his federal income tax returns for 1946 and 1947 on the cash basis. (R. 2.)

During the early months of 1945, while married to and living with Ada Zoeller Tressler, taxpayer purchased the Maxwell Court Apartments and the Tarpon River Apartments in Broward County, Florida, in the name of Kenneth Tressler, his son by a former marriage. Title to other properties purchased was taken in the name of Ada Tressler and taxpayer jointly. The taxpayer also owned additional property, and a receivership hereinafter mentioned did not include all his property. (R. 2-3.)

Shortly after purchase of this property Ada Tressler filed suit for support "unconnected with a divorce" in the Florida courts. In that suit she asked for a decree adjudging that the properties purchased in the name of Kenneth were held in trust for the taxpayer and requesting that a receiver be appointed to take charge of those properties, collect the rents and pay the proceeds into court to insure the payment of any sums that might be adjudged due and payable to Ada by the taxpayer. (R. 3-4.)

On March 13, 1945, the Florida court entered an order appointing a receiver for the two apartment properties, restraining Kenneth and the taxpayer from transferring those properties, and directing the receiver to collect the rents, pay expenses of operation, and deposit the balance of the receipts in a bank subject to further court order. (R. 4.)

On June 28, 1945, an order was entered making an allowance of $300 per month, retroactive to March 3, 1945, for temporary alimony and support of Ada and $2,000 temporary attorney fees, and court costs of $334.86.

On July 17, 1945, taxpayer was granted a Nevada divorce from Ada in an action begun by him May 7, 1945. This action was uncontested by Ada, and no provision for alimony was made in the decree. (R. 4.)

In October 1945, Kenneth sought to file a further answer in the Florida proceedings in an effort to regain possession of the apartment properties and to plead therein the Nevada divorce decree, but was denied the right to file the answer. By order dated January 7, 1946, the Florida court decreed that the apartment properties purchased by the taxpayer in the name of Kenneth were properties of the taxpayer and held in trust for him by Kenneth. Later in January the court ordered the receiver to pay the sum of $5,334.86. This amount was made up of three items: (1) $3,000 for accrued support of Ada from March 3, 1945, to January 3, 1946; (2) $2,0000 temporary attorney fees; and (3) $334.86 costs. (R. 4-5.)

An appeal from those orders was denied by the Florida Supreme Court and Kenneth took the matter to the United States Supreme Court. While that proceeding was pending, the taxpayer himself began an action in a United States District Court in Florida against Ada, the receiver, and others, seeking recovery of his apartment properties held in receivership. A motion to dismiss was granted and an appeal was taken. While this appeal was pending and after the United States Supreme Court had denied certiorari in Kenneth's case

the parties entered into a settlement agreement under which Ada acquired the Tarpon River Apartments and other properties and taxpayer retained the Maxwell Court Apartments. In accordance with the settlement agreement all the litigation above described was terminated and a decree was entered by the Florida court to the effect that the various court orders be marked satisfied and the properties be released from the receivership.[1] (R. 5.)

On August 31, 1947, the taxpayer sold the Maxwell Court Apartments for $59,000. (R. 5.)

In connection with the litigation in the Florida and the United States courts, the taxpayer bore the expense of the legal representation for Kenneth and himself.

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[1] A summary of the income and disposition of the rents collected, expenses paid, and disposition of the remaining funds by years by the receiver is shown in the following schedule (R. 6):

	1945	1946	1947	Total
Rents collected	$7,393.50	$11,092.95	$2,410.00	$20,896.45
Expenses paid	2,992.91	3,199.48	2,269.50	8,461.89
Income after maintenance expenses	$4,400.59	$7,893.47	$140.50	$12,434.56
Other payments by receiver: Ada Tressler		$3,000.00	$984.69	$3,984.69
Davis & Lockhart, Attorney for Ada Tressler		2,000.00	2,862.55*	5,197.41
Ruth Westerberg, Receiver			1,559.46	1,559.46
Hugh Lester, Attorney for Receiver			1,500.00	1,500.00
Court Costs		334.86	193.00	193.00
Total other payments by receiver		$5,334.86	$7,099.70	$12,434.56
Amount retained by receiver	$4,400.59	$2,558.61		

* This amount according to the court's order was for expenses and attorney fees "for services rendered to the Receiver, in all Federal Courts."

For the year 1946 he claimed on his return a deduction of $1,425 for legal expenses and attorneys fees; by amended pleadings he claimed $5,500. For 1947 he claimed a deduction of $5,035 for such expenses; by amended pleadings he claimed $6,535. (R. 6.)

The Commissioner determined a deficiency of $701.07 for 1946 based on disallowance of claimed legal expenses of $1,425 and depreciation of $1,931.25. By amended answer the Commissioner increased the deficiency for 1946 to $2,239.64 based on his contention that the taxpayer realized additional income by reason of the payment of $5,334.86 made by the receiver to Ada under the January 17, 1946, order of the Florida court for support, attorney fees, and court costs. (R. 6-7.)

The Commissioner determined a deficiency of $936.29 for 1947 as a result of the disallowance of the claimed deduction of $5,035 for attorney fees and an error of $1,000 (admitted by the taxpayer) in computing net income. By amended answer this deficiency was increased to $3,967.15 partly based on the contention that the taxpayer realized additional income by reason of payments amounting to $7,099.70 made by the receiver under final decree of the Florida court dated July 16, 1947. The increase also was occasioned by disallowance of $2,517.50 legal expenses which were added by the Commissioner to the cost of the Maxwell Court Apartments in computing the capital gain arising from the sale thereof. Another portion of the increase resulted from increasing the capital gain by off-setting depreciation for 1946 on the apartments in the sum of $1,246. (R. 7.)

The Tax Court sustained the Commissioner in his actions with respect to both tax years, except that for

the year 1947 it held that an item of $2,862.55 and one of $1,500 paid to attorneys (R. 6) represented receivership expenses and did not, as the Commissioner had asserted (R. 7) constitute additional income to taxpayer. Decisions were entered (R. 16-17) in accordance with a computation made under Rule 50 of the Tax Court's rules (R. 34-38).

SUMMARY OF ARGUMENT

The payments made by a receiver, pursuant to a Florida court order, to taxpayer's wife for "temporary alimony and support", attorneys fee and court costs, from funds in the hands of the receiver belonging to taxpayer constituted taxable income to him. The fact that taxpayer did not have custody or control of the funds is immaterial for by the application thereof in satisfaction of legal obligations imposed upon him he received the benefit of such funds and was properly taxable thereon.

In so holding, the Tax Court gave full faith and credit to both the Florida decree ordering the payments and a prior Nevada divorce decree obtained by taxpayer. However, since the Florida court had rejected all efforts to inject the Nevada decree into the Florida proceedings, the payments obviously were not made under the Nevada divorce decree and hence could not be considered taxable income to the wife under the provisions of Code Section 22(k), as taxpayer argued.

Similarly, since the payments were not made pursuant to any "decree" of separation by the Florida court they were not taxable to the wife under Section 22(k).

Taxpayer's further contention that the Tax Court erred in denying him the right to deduct the legal expenses incurred "in trying to recover possession of his

income producing properties'' is equally without merit. The Tax Court found that the expenses were not incurred for the purpose declared by taxpayer, but rather were incurred primarily to defeat his wife's suit for support. This Court has held under similar circumstances that expenses so incurred were not deductible as non-business expenses. Furthermore, as to the portion of those expenses paid on behalf of his son Kenneth, taxpayer was a volunteer and could not claim a deduction therefor under any provision of the Code.

Finally, taxpayer's claim that the Tax Court erred in refusing to allow him the full depreciation claimed on the properties involved is without merit for he failed to sustain the burden of proof with respect thereto.

ARGUMENT

I

The Tax Court Did Not Err in Holding That Sums Paid to Discharge Legal Obligations Imposed on Taxpayer Were Taxable Income to Taxpayer

Taxpayer, having first asserted as error (Br. 7, 8-9) that the Tax Court failed to accord full faith and credit to the Nevada divorce decree obtained by him under date of July 17, 1945, argues (Br. 10-11) that the payments thereafter ordered to be made to his wife by the Florida court as ''temporary alimony,'' as well as court costs and attorneys' fees, were taxable as income to his ''former'' wife under Sections 22(k), 23(u), and 171 of the Internal Revenue Code (Appendix, *infra*).

The question before the Tax Court, however, was not the full faith and credit of the Nevada decree, but rather the tax treatment to be accorded the sum of

$5,334.86 (consisting of $3,000 accrued support for his wife from March 3, 1945, to January 3, 1946; $2,000 temporary attorneys' fees; and $334.86 court costs) for the year 1946 and the sum of $7,099.70 (including $984.69 support money and $193 court costs) for the year 1947 (R. 1-2) as between taxpayer and his wife.

In resolving that question insofar as it related to the support payments, attorneys' fees, and court costs, the Tax Court found (R. 8) that those items represented obligations imposed on taxpayer by the Florida court; that they were satisfied by the application of funds derived from rentals from properties found by the Florida court to belong to taxpayer; that they were personal obligations of the taxpayer unconnected with the operation of those properties in the hands of the court appointed receiver; that taxpayer reported his income on a cash basis and consequently was properly taxable in 1946 and 1947 when he received the benefit of those funds through the discharge of his obligations to his wife under the Florida court order.

It was not incumbent upon the Tax Court to resolve the validity of the Florida court's right to order the payments in question, as taxpayer contends. (Br. 8-9.) That was a matter for determination by the Florida courts, and upon appeal to the Supreme Court of Florida, the action of the lower court was affirmed without opinion. *Tressler* v. *Tressler,* 157 Fla. 881, 27 S. 2d 341, certiorari denied, 329 U. S. 796, rehearing denied, 329 U. S. 834. The Tax Court was obligated to recognize the validity of that decision just as it was bound to recognize the Nevada divorce decree, and, in fact, by doing so it resolved the tax liability complained of. This is best explained, as it was by the Tax Court (R.

10-11), by considering taxpayer's argument that the temporary alimony payments constituted income to his former wife under Section 22(k) and correspondingly were deductible by him under Section 23(u).[2]

As appears from the unquestioned findings of the Tax Court and as the Tax Court pointed out, the payments were made solely in connection with litigation instituted by the wife in a Florida court and had no relation to the Nevada divorce which made no provision for alimony or support. The suit was entitled a "Bill for Alimony Unconnected with Divorce" and prayed for "temporary and permanent support and alimony unconnected with a divorce together with suit money and a reasonable amount with which to compensate her attorneys." (R. 3, 4, 11.) In granting the relief sought, the Florida court denominated the payments ordered as "temporary alimony and support". (R. 10, 32; Br. 26.) Furthermore, as also noted by the Tax Court (R. 10-11), the record does not disclose that any "decree * * * of separate maintenance" such as required by Section 22(k) was entered in the Florida litigation.

Although taxpayer's son Kenneth, one of the named defendants in the wife's suit, had sought to plead the Nevada divorce decree therein in connection with his effort to regain possession of the apartment properties which the Florida court had placed in the hands of a receiver pending determination of the ownership thereof, he was denied the right to do so. (R. 4.)[3] As

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[2] Whether taxpayer is claiming that the court awarded attorneys' fees and court costs are also deductible under Section 23(u) is not clear. However, such expenses are clearly personal and not deductible under any provision of the Internal Revenue Code. See *Howard* v. *Commissioner*, 202 F. 2d 28 (C. A. 9th).

[3] The reason for the denial does not appear from the record herein.

the Tax Court observed (R. 11), the Florida courts resisted all taxpayers's efforts to inject the Nevada divorce decree into the Florida proceedings.[4]

In determining whether the payments are taxable to the wife under Section 22(k) it is required that the wife be "divorced or legally separated" from her husband "under a decree of divorce or of separate maintenance"; that the payments be "received subsequent to such decree"; and that they discharge a legal obligation which because of the marital relationship is imposed upon or incurred by the husband "under such decree or under a written instrument to such divorce or separation."

Under the circumstances described above it is clear that inasmuch as the Nevada decree was not before the Florida court, the payments in question had no connection whatsoever with the Nevada divorce, but rather were made in total disregard of that decree. Consequently the payments are not taxable to the wife nor deductible by the husband under the provisions of Sections 22(k) and 23(u) as far as the Nevada decree is concerned.

With respect to the decision of the Florida court, it is clear that a voluntary separation is insufficient to satisfy the statutory requirements of Section 22(k); there must be a *decree* of separate maintenance. *Terrell* v. *Commissioner,* 179 F. 2d 838 (C. A. 7th); *Daine*

[4] The action of the Florida court decreeing that the apartment properties purchased by taxpayer in the name of Kenneth were properties of the taxpayer and held in trust for him by Kenneth and ordering the receiver to pay the sum of $5,334.86 to taxpayer's wife, was affirmed by the Florida Supreme Court without opinion, 157 Fla. 881, 27 S. 2d 341, certiorari denied, 329 U. S. 796, rehearing denied, 329 U. S. 834. Those decrees, constituting parts of Exhibit E, are printed in Appendix C at pages 24-35 of taxpayer's brief.

v. *Commissioner,* 168 F. 2d 449 (C. A. 2d); *Brown* v. *Commissioner,* 7 T. C. 715; *Kalchthaler* v. *Commissioner,* 7 T. C. 625; *Wick* v. *Commissioner,* 7 T. C. 723, affirmed *per curiam,* 161 F. 2d 732 (C. A. 3d); *Brightbill* v. *Commissioner,* decided February 4, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,021), affirmed *per curiam,* 178 F. 2d 404 (C. A. 3d); *Fields* v. *Commissioner,* 14 T. C. 1202, affirmed on other grounds, 189 F. 2d 950 (C. A. 2d); *Fox* v. *Commissioner,* 14 T. C. 1131; *McKinney* v. *Commissioner,* 16 T. C. 916.

In the absence of any such decree of separate maintenance, the Tax Court correctly held that the payments should receive the same treatment as payments of alimony *pendente lite* or payments made between the entry of an interlocutory decree and the time the decree became final. Such payments, however, are not taxable to the wife under Section 22(k) nor deductible by the husband under Section 23(u) of the Code. *McKinney* v. *Commissioner, supra; Fields* v. *Commissioner, supra; Fox* v. *Commissioner, supra.*

Since, as pointed out above, there was no evidence before the Florida court that taxpayer herein was divorced from his wife, and since the Tax Court found (R. 11) that no decree of separate maintenance was entered in the Florida litigation, it follows that there is no basis for taxpayer's contention (Br. 10-11) that the payments in question are income to his wife under Code Section 171.

The fact that the taxpayer did not actually receive any of the revenue collected by the receiver from the operation of the apartment properties and paid to his wife pursuant to the orders of the Florida court, does not relieve him from liability for tax thereon as he

contends. (Br. 6.) Taxpayer reported his income on the cash receipts and disbursements basis and is, therefore, taxable on income when credited to him. The discharge of taxpayer's indebtedness in 1946 and 1947 by the payment of temporary alimony and support, attorneys' fees, and court costs constitutes a receipt by taxpayer of the sums so paid. See *Douglas* v. *Willcuts,* 296 U. S. 1; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716 ; *United States* v. *Boston & M. R. Co.,* 279 U. S. 732; *Helvering* v. *Horst,* 311 U. S. 112; *Commissioner* v. *Smith,* 324 U. S. 177, rehearing denied, 324 U.S. 695; and *Coaster Amusement Co.* v. *Commissioner,* decide July 8, 1943 (1943 P-H T.C. Memorandum Decisions, par. 43,333).

II

The Tax Court Did Not Err in Disallowing as Deductions Legal Expenses Incurred in Contesting a Wife's Suit for Support

Taxpayer also claims error on the part of the Tax Court (Br. 12) in denying him the right to deduct "legal expenses expended in trying to recover possession of his income producing properties". The right to the deduction is apparently claimed under Section 23(a)(2) of the Code (Appendix, *infra*),[5] which allows deductions for nonbusiness, ordinary, and necessary expenses paid or incurred "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

The relevant facts, as found by the Tax Court, show

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[5] In its opinion, the Tax Court pointed out (R. 11) that taxpayer had not cited any sections of the Code in support of his claim, but that whether he relied on Section 23(a)(1)(A) or (a)(2) he was not entitled to the relief sought.

that title to the properties was originally taken in the name of taxpayer's son, Kenneth; that in connection with her suit for support, taxpayer's wife sought a decree adjudging that those properties were held in trust for taxpayer, and that a receiver be appointed to operate the properties to insure the payment of any sums that might be found due her. (R. 3-4, 12.) Counsel were thereupon employed for Kenneth and taxpayer in an attempt to sustain Kenneth's ownership of the properties. After the Florida courts declared that taxpayer was the owner of the properties, taxpayer began an action in his own name in the United States District Court for the Southern District of Florida wherein he sought to recover possession of the properties held in receivership. (R. 5, 12.) Taxpayer bore the entire cost of the litigation both for himself and Kenneth (R. 6, 12) and claims a deduction therefore in the amount of $5,500 for 1946, and $5,035 for 1947 (R. 11).

As the Tax Court held (R. 12), taxpayer was a mere volunteer with respect to the legal fees paid on behalf of his son Kenneth, and consequently they are not deductible under any theory.

As to taxpayer's own legal expenses (the amount of which is not disclosed by the record), the Tax Court found (R. 12-13) that the "genesis of the litigation" giving rise thereto was the dispute between taxpayer and his wife over support payments, that they were incurred primarily to defeat the wife's suit and not to protect taxpayer's property, and consequently that they were not deductible as non-business expenses under Section 23(a)(2). That conclusion is supported by this Court's decision in *Howard* v. *Commissioner,* 202 F. 2d 28, affirming 16 T. C. 157, wherein it was held that at-

torneys fees and costs incident to the defense of an action brought by a divorced wife to collect alimony payments were not deductible by the husband as a nonbusiness expense under Section 23(a)(2). See also *Jergens* v. *Commissioner,* 17 T. C. 806, and *Donnelly* v. *Commissioner,* 16 T. C. 1196.

In the alternative, taxpayer claims (Br. 13) that "the least" the Commissioner should have allowed him was to add to the cost of the Maxwell Court Apartment the legal fees and expenses incurred "in defending and maintaining litigation seeking to protect the title and right to possession and right to receive the earnings from the income producing property", and thus apparently (R. 13-14) to reduce his capital gain on the sale of that apartment. As the Tax Court reiterated (R. 14) they were not such expenditures but were primarily incurred in attempting to defeat his wife's claim for support.

III

The Tax Court Did Not Err in Failing to Allow the Increased Depreciation Claimed

With respect to his contention (Br. 11-12) that the Tax Court erred in failing to allow all the depreciation claimed by him on the properties in question, the Tax Court pointed out (R. 14) that in view of its holding that taxpayer was properly taxable on income therefrom in 1946 he was also entitled to depreciation thereon in the amount disallowed by the Commissioner. However, it refused to allow increased depreciation claimed in his amended pleadings because the record contained no evidence on which it could reasonably make a finding on the issue. Although patently claiming error in this respect, taxpayer fails to point to any facts of

record supporting his position. It is axiomatic that the burden of proving the right to a claimed deduction rests upon taxpayer. *Interstate Transit Lines* v. *Commissioner,* 319 U.S. 590, 593; *Deputy* v. *duPont,* 308 U.S. 488, 493.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General.

Ellis N. Slack,
A. F. Prescott,
George F. Lynch,
Special Assistants to the Attorney General.

August, 1954.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(k) [as added by Sec. 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife * * *.

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

* * * * *

(2) [as added by Sec. 121(a) of the Revenue Act of 1942, *supra*] *Non-Trade or Non-Business Expenses.*—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(1) [as amended by Sec. 121(c) of the Revenue Act of 1942, *supra*] *Depreciation Deduction.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(u) [as added by Sec. 120(b) of the Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible

in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 171 [as added by Section 120(c) of the Revenue Act of 1942, *supra*]. INCOME OF AN ESTATE OR TRUST IN CASE OF DIVORCE, ETC.

(a) *Inclusion in Gross Income.*—There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband, and such amount shall not, despite section 166, section 167, or any other provision of this chapter, be includible in the gross income of such husband. * * *

(b) *Wife Considered A Beneficiary.*—For the purposes of computing the net income of the estate or trust and the net income of the wife described in section 22(k) or subsection (a) of this section, such wife shall be considered as the beneficiary specified in this supplement. A periodic payment under section 22(k) to any part of which the provisions of this supplement are applicable shall be included in the gross income of the beneficiary in the taxable year in which under this supplement such part is required to be included.

* * * * *

(26 U.S.C. 1952 ed., Sec. 171.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.22(k)-1. *Alimony and separate maintenance payments—Income to former wife.*—(a) *In general.*—* * *
>
> In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:
>
> (1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, or
>
> (2) Attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband.
>
> The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:
>
> (1) A court order or decree divorcing or legally separating the husband and wife, or
>
> (2) A written instrument incident to such divorce or legal separation.
>
> The periodic payments received by the wife attributable to property so transferred and includible in her income are not to be included in the gross

income of the husband. See also section 29.171-1 in cases where such periodic payments are attributable to property held in trust.

* * * * *

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